UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MEDA AB

Plaintiff

v. 11 CV 0412 (AJN)

3M COMPANY, 3M INNOVATIVE PROPERTIES COMPANY, and RIKER LABORATORIES, INC.

Defendants
----------x

New York, N.Y.
January 31, 2013
9:45 a.m.

Before:

HON. ALISON J. NATHAN,
District Judge

APPEARANCES

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorneys for Plaintiff
MICHAEL B. CARLINSKY
PETER J. ARMENIO
DEBORAH K. BROWN
NICHOLAS J. CALAMARI

BICKEL & BREWER
Attorneys for Defendants
ALEXANDER DAVID WIDELL
JAMES S. RENARD
JEREMY D. CAMP
MICHAEL COLLINS
AAMER RAVJI

DORSEY & WHITNEY LLP
Attorneys for Defendants
THERESA M. BEVILACQUA

-also present-
MARY YEAGER

(Trial resumes)

(In open court)

THE COURT: Good morning, everyone. Please be seated.

We're here for summation and closing argument in this matter that we tried a week ago. I think I set 90 minutes per side if you need it. Obviously, if you don't or if I think I need more time, I'll let you know. We'll see what the flow of the argument is.

I guess we didn't talk about a structure, whether there would be a rebuttal. Typically in a jury context I encourage the defendants to go first and then the plaintiffs to go, but we could also have a short rebuttal for plaintiffs.

Have you thought about how you want, made an assumption how it would be structured?

MR. CARLINSKY: I think our thought, your Honor, was that we would start with our closing, we would try to reserve about 20 or 25 minutes for rebuttal following the defendant's closing.

THE COURT: Mr. Renard?

MR. RENARD: Your Honor, that is fine with us.

THE COURT: All right. Let's see how we go. Who will make the closing for plaintiffs?

MR. ARMENIO: If it is acceptable to your Honor, what we will do is split the closing along familiar lines, where I will be handling most of the breach of contract and damages and

Mr. Carlinsky will be handling most of the fraud aspects.

THE COURT: You want to reserve 20 minutes?

MR. ARMENIO: Yes, your Honor.

THE COURT: You'll lead it off, Mr. Armenio?

MR. ARMENIO: Yes, your Honor. Thank you.

May it please the court, the evidence presented during trial in this matter was more than sufficient to prove each of Meda's claims in this action, breach of contract, breach of the covenant of good faith and fair dealing and fraud.

As Meda showed, each of these claims flows naturally from the background and context of the transaction between 3M and Meda for the business and the background and context of 3M's negotiations with CEPS for the undisclosed pricing agreement that has been at issue in this trial.

Meda further showed how each of its claims is fully supported and comports with contemporaneous documents and presented those documents in a chronological fashion, showing what people were actually saying and thinking at the time these actions were occurring, not after-the-fact, with later arguments and later theories.

3M's defenses, it would seem, constantly changed throughout this two-year litigation and even constantly changed during this trial. We see they have no support for those defenses in the background and context of the transactions at issue or in contemporaneous documents.

With respect to the background and context of 3M's sale of the business, just to touch on it -- and these are familiar from the opening -- 3M knew its pharmaceutical business was falling. We saw that out of the board of director's presentation, PX 133, and we learned more of that at trial from Mr. Sauer. He told us at the point they decided to exit the worsening of the situation in France meant the spinoff option was doubtful.

That meant this business was in such bad shape that it couldn't even be viable spun off and they needed a buyer. That is what they told the board, and they presented to the board in PX 142 the upside down hockey stick. The pharmaceutical business was in such bad shape by the end of 2005, they projected almost negative 10 percent. Mr. Sauer admitted it on the stand, by November 2005 the negative 10 percent, not quite but close.

Mr. Sampson, we heard him talk about the death spiral of the business in the contemporaneous documents, PX 158, and then during trial he admitted as soon as he took over the business from Mr. Labinger, they needed to look for different options, and Mr. Sauer was concerned with the trajectory of the business.

Now, when we look and contrast that death spiral, negative 10 percent situation worsening, the business couldn't even survive on its own, we contrast that with what 3M told

Meda in the offering memorandum, PX 168. The court is fully familiar with that document at this point. Mr. Sauer explained that despite all of 3M's arguments, he agreed that this offering memorandum didn't speak at all to the risk of a pricing decline for Tambocor CR.

Throughout the offering memorandum we showed how 3M took pains to talk about how strong EBITDA margins would be, the business was highly profitable and substantial and consistent cash flow including specifically in Europe, Cable 43 and specifically for cardio, showing it was glowing.

3M decided to speak on this issue. They decided to tell Meda the business was strong and growing, and once they made that choice of speaking, they had to tell Meda the whole truth, and the fact of the matter is they didn't. They put in statement after statement about EBITA and gross margins being constant up. We heard from Mr. Larnholt and @Mr. Gears when you see this margin staying high on the revenue, you know that prices are stable. That is the business that 3M presented to Meda.

When asked on the stand about this, anything in the offering memorandum that refers to pricing pressure, there is general statements -- Sampson? Yes. Anything specific about Tambocor CR? Mr. Lonner admitted he didn't factor it into the offering memorandum. They knew and they didn't tell Meda. It was even more apparent in the business presentation, PX 421,

where they presented the chart of Tambocor CR sales growing so much that they would offset any decline in Tambocor II, and Mr. Sampson, when confronted with this slide, admitted he didn't expect a reader, reviewing Page 155, to conclude that the Tambocor CR price in France was at risk. In what is perhaps the understatement of the year, it is very difficult to tell from the growing sales, 46 percent up year-over-year. 3M portrayed the business as growing and portrayed Tambocor CR and didn't tell the truth.

There was nothing in here to alert Meda. The best Mr. Sampson could come up with was well, maybe the growth rate slowed down a little bit, but they portrayed in the business presentation and the offering memorandum that Tambocor CR was still growing, and Mr. Sampson had to admit nothing specific about a particular risk as Tambocor CR? Correct.

Mr. Sauer admitted the same thing. Nothing that would indicate in these documents the offering memorandum and business presentation, that Tambocor CR is actually at risk?

Correct.

So these are admissions that have fleshed out the theories of the case on which we brought suit, on which we opened and on which we have been consistent throughout these two years.

We look about pricing specifically. Mr. Lonner asked Mr. Sampson whether it was any other information that Meda

needed to know about at the business presentation. It is in the Lonner Declaration, Paragraph 39. Mr. Sampson said there was nothing else, and on the stand Mr. Sampson would not deny that this conversation happened, professed a lack of memory, but he didn't deny it Mr. Lonner further talked about whether there was discussing of pricing in the business presentation, and he explained yes, pricing, yes, means in France that you have to take into consideration the reimbursement situation.

So they were talking. Mr. Lonner, CEO of Meda, was talking to Mr. Sampson, the global head of 3M Pharma, including about pricing, and Mr. Sampson, as he admitted, said nothing, and he said nothing even though a month earlier, in May of 2006, he admitted he learned specifically about the pricing convention in a meeting in Serge, France.

Mr. Sauer, he was no better than Mr. Sampson. He knew the risk. On your Honor's direct questioning, you asked Mr. Sauer can he quantify the risk? And he responds, was it an important risk? Yes. What kind of decrease was conveyed to you? A pretty wide range of outcomes.

Then in questioning, further questioning from Meda, do you recall you have been advised there was a risk of 40 percent? I was shown slides on it. 40 was on there.

Mr. Sauer knew of the risk. Mr. Sampson knew of the risk. They stayed silent despite the representations they knew were being made to Meda that were false regarding the stability

and growing profitability of Tambocor CR in France.

Mr. Keel, Mr. Keel was no better than Mr. Sauer or Mr. Sampson. He sent Meda the happy e-mail in October 2006, Oh, look how good the business is doing, it is up versus the offering memorandum. JX 98.

Roughly the same time in France we see in JX 104 A, Ms. Kolsky is talking about how they had to delay the review of the case file in order to preserve the price of Flecaine IR and CR. So while Mr. Keel is telling Meda don't worry, everything is in great shape, Ms. Kolsky and her colleagues in France, JX 104 A, are busy delaying the price negotiation because they all know as soon as that price negotiation, as soon as they bring to CEPS attention the fact they're overdue on their convention, the price is going to go down dramatically and the business is going to lose significant value.

James, go to slide 20, please.

THE COURT: Mr. Armenio, I want to give you some room to do the presentation, but I have been thinking in boxes a little bit. You are still in the sort of providing pointed all of this in the context of the overall context of the transaction and what was disclosed, right?

Because I think you said you were going to focus on the contract dispute?

MR. ARMENIO: Yes, your Honor.

My thought, and I wanted to present it the way your

Honor wants to hear it, was to talk about the background of the business transaction which I just did and to talk about a bit of the background of the CEPS-3M negotiation and then go and show how that background in context and the contemporaneous documents plug in and prove the elements of the contract case, and Mr. Carlinsky will do the same on the fraud case.

So looking at Slide 20, your Honor I am sure has read Article 2.2 more times than your Honor probably cares to have red it, JX 19 A, we know when the price was published April 12, 2003, so we know this three years was coming due in April 12, 2006.

What is really striking in this whole case is Meda based its case on the actual negotiation between Eric Felber and CEPS that resulted in the March 2003 convention. 3M did not. 3M didn't do that at all. They didn't even have, Mr. Schur was sitting there on the stand, the proffered expert in French law on this convention, and he admitted he didn't even read the deposition of Felber prior to preparing his declaration.

How how can you have a person opine on French law on the document when they don't read the hundred-plus pages deposition 3M negotiated and all contemporaneous documents exhibits to that deposition?

THE COURT: You mean then that the question, the French law question of what was 2.2, if it was a regulation, if

it was a requirement, if it was contract, was there a breach, turns at some level on the intent of Mr. Felber as a matter of French law? And what can you point me to for that proposition?

And if not, then why should Mr. Schur have cared what Mr. Felber had to say?

MR. ARMENIO: If we look at the French law and you look at the negotiation, what happens here is in reality, there was no lack of clarity or ambiguity. 3M knew exactly what it was bargaining for, as reflected by the documents from Mr. Felber leading up to the transaction and the documents leading after.

3M's prime argument is wholly detached from that and say they say, oh, it is too ambiguous to be enforced, it is too unclear to mean anything. We were free from this because it's -- what did Mr. Schur say, a throw away it was in his view.

What the contemporaneous evidence of negotiation and the then implementation shows is it was not ambiguous to 3M at all, and what it shows is that their prime argument of ambiguity and lack of clarity is baseless.

THE COURT: I am going to go back to my question.

To think in the box of your breach of contract claims, your warranty claims, tell me how the pieces come together? I think of the answer to those questions and I think, as I've looked at at least the arguments presented in the document you

submitted yesterday, which I've read both, and I am glad to have it, I can't say I have had enough time to fully, fully study, but I think the basis of the argument is, Judge, we're going to tell you about what a law is, what a regulation is, what a requirement is, what a contract is as matters of French law, and then we are going to look at 2.2 and show you how it fits within that.

And so I think that's right, and then tell me how I know what to do as a matter of understanding French law with the intentions of the 3M employee who negotiated that provision of CEPS.

MR. ARMENIO: I think the clearest answer to your Honor's question is Mr. Schur's admission that -- Page 1307 of the transcript, and he explains that when a future price is fixed but contingent on a future event in a convention, CEPS can publish the price when the event occurs.

So the whole argument --

THE COURT: Say it again.

MR. ARMENIO: Sure. Mr. Schur admits when there is a future price contingent -- can you put 20 up on the screen -- when a future price is fixed but contingent on a future event in a convention, CEPS can publish the price when the event occurs. So we see here there is a future event at the end of the three-year period and it is fixed what is going to happen.

Either 3M will have put in a equivalent of proprietary

drugs on the market or they're going to price their Flecaine LP at the price corresponding to the generic drug, and the whole argument has not been over whether that is French law. Mr. Schur admits it. He admits it flatly and he says he admitted further, CEPS' job is to enforce future price changes that are agreed to in a convention. That is at 13 of page 1309.

THE COURT: Right, and he says but this isn't that.

MR. ARMENIO: Correct. He is arguing, well, this isn't clear enough to fix the price. In his mind, he wanted to see 16.35 euros or something more. In his view, that is what is necessary.

THE COURT: He said a couple of times they know how to do this. If it is what they wanted to do, they would have done it.

MR. ARMENIO: What we have shown is in the negotiation leading up to Article 2.2 and the implementation of it afterwards, 3M knew exactly what the formula was. There are documents, document after document, where 3M explains the particular amount of the price increase in its own internal workings.

So they knew -- if we go, James, please, Slide 28 -- for example in PX 62 A, at that point it is the beginning of 2005, 3M knew that there was a fixed formula for what would occur in 2006 for this and it was a decrease in price minus 40 percent. That is right in PX 62 A. Then we see later in time

when the CEPS policy changes, they have similar documentation showing that it then became a minus 50 percent for the generic.

So when we look at this language -- James, can we go do 20 again -- about whether the price was fixed, what 3M bargained for and what 3M then implemented and understood shows that the future event and the price in the future was fixed, and 3M certainly knew what it was fixed to be.

The concept of whether a third party, divorced from all of these things, what they know precisely, I would suggest they would because the pricing of a generic was known in France by CEPS policy and decree of these documents, but especially 3M knew. 3M negotiated for this. They were kept off the market for over 400 days by CEPS and the social security minister until they agreed to do just this, launch a generic or go to the generic price within three years.

There is no possibility that they didn't know what was expected of them. When you have a future price condition like this, Mr. Schur himself admits CEPS can just publish the price, Mr. Destal's testimony is exactly consistent, and so that is why I view the negotiation leading up to it.

THE COURT: Why couldn't it be that is what they were trying to do, but they didn't do it as a matter of French law?

Is that a possibility?

Because then it seems to me your point about what Felber had in his mind and Mr. Renaudin had in his mind is

pertinent to the question of what they were trying to do, but not necessarily what they effectuated, which seems to me again in the context at least of the contract claims.

MR. ARMENIO: Can we go to 79, please, James, please.

To answer your Honor's question, even if they somehow didn't use the exact right words to reach regulatory status, everyone on the stand knew that this document at a minimum provided industry guidance. We see that in Section 3.07 of the contract. Everybody knew, every single person who got on the stand and testimony, at a minimum, bare minimum, this convention indicated what CEPS expected to happen within three years. Mr. Schur used the word, "markers." He said it set down markers for what CEPS expected to happen in three years.

So even if it didn't rise to the level of specificity for a regulation -- we submit that it did, but even if it did not, it still at a minimum provided industry guidance to 3M regarding what should happen, and 3M breached its representation on 3.07 because it didn't tell Meda.

So you have got at a minimum a regulator who expected a significant price cut in three years. We believe it rose to the level of a regulation in the law, but at a minimum it was an expectation and guidance by CEPS of what they expect to happen, and 3M, despite this representation that it told Meda about all industry guidance, didn't tell Meda.

So Meda is sitting there, and as the documents show,

completely surprised, gets this letter from CEPS saying no generic on the market, time for you to cut the price by 50 percent, and they scramble and negotiate and they explain they didn't know, but even after all of that they get hit with a 30 percent price cut.

Again we believe that this is a regulation and violates 3.07 in that regard, but at a minimum it is an industry guidance more often. Let's take a look at law.

THE COURT: Sir, I want to focus my eyes for a second on the rest.

MR. ARMENIO: Yes, your Honor.

(Pause)

THE COURT: Okay. Thank you.

MR. ARMENIO: We look further. In addition to violation of the representation by not providing industry guidance, they violated by not being in compliance with the law because let's look at the law. Law includes regulations, and again we have ample testimony from Mr. Schur and Mr. Destal that the convention was a regulatory act, so at a minimum it should have been disclosed.

Mr. Schur wants to say only part of the document was a regulatory act, not all of it, but the document itself wasn't disclosed at all. No part of it was disclosed. They violated it. Mr. Destal explains the whole document. This is a regulatory act.

THE COURT: On this point, his point was part of it was and that part was the pricing and that part wasn't a lack of compliance with the listed pricing.

MR. ARMENIO: But actually -- and I am glad you raised that, your Honor -- there was, there really was because something that Mr. Schur said was important.

At Page 1306, he explains the convention is a regulatory act because it governs the conduct of non-parties like pharmacists and patients. That is why it is a regulatory act in France. It is not just again CEPS and drug company. It affects the pharmacists and the patients, and that is why it is a regulatory act.

If I am a patient on May 5th, 2006, I am paying too much for Flecaine LP because 3M violated its convention with CEPS. I am harmed as a patient in France every single day after May 12, 2006 because I'm paying too much. That convention specifies the price that patients should pay.

They go in and they pay, and there is the wholesale price and there is the pharmacist's price. Yes, social security covers a lot of it, but that is the price both to the patient if there is any out-of-pocket if they don't have any insurance and through to the government.

Every single person overpaid after April 12th, 2006 because 3M didn't honor its contract. It is a regulatory act. The future price fixed formula was in there. Reduce it to the

price of a generic. That is why the whole thing is a regulatory act and you can't just part and parcel it.

The people who stood to benefit the most, the people who actually pay were harmed the most the day after three years when 3M kept silent, didn't tell CEPS, didn't give them the required notice under 162-20-1 and also then Meda was harmed because it didn't tell Meda. It was a regulation in its entirety, meant to protect patients and pharmacists and it was thwarted because 3M didn't put a generic on the market and didn't cut the price.

If we look at further the definition of law includes governmental orders, and a government order includes decrees but also stipulations and determinations, at a minimum every person who got on the stand admitted that this convention was an agreed form work of intent. It was at a minimum an agreed understanding. It was an agreement. We have countless documents that call it a contract. At a minimum it was a stipulation between CEPS and 3M; here's what we're going to do in three years.

Meda contends it had the specificity in the price prediction provision to be a regulation, but even if it did not, it was at a minimum a stipulation between CEPS and 3M which makes it a law that 3M was not in compliance with, and at the barest minimum, it was an industry guidance of CEPS telling 3M what it wants the price to be, putting down, as Mr. Schur

himself said, the markers of what he expected, of what CEPS expected to see.

When we look, we can see --

THE COURT: Under this theory, there was a whole lot of stuff that should have been put in that data room that wasn't, right?

MR. ARMENIO: There was a whole lot of stuff that should have been put in that data room, you're exactly right, your Honor. They breached their representation on this countless ways, but what we know from Mr. Dierks, who explained it, is 90 plus percent of the time he even used the No. 97 or 98, a convention is just the price, the drug name and the price, just those two things and those are published. So the fact that there was not a stack of conventions that just said drug price, drug name and drug price didn't set off alarm bells for Dr. Dierks.

THE COURT: Doesn't that run against your argument as to what the intent of this language was if you're saying the intent of this language should be read in a way to capture just a massive amount of stuff that everybody would know?

I mean it seems to me it is fairly obvious from questioning and testimony that anyone looking at it would know there were no CEPS conventions in there, and if that didn't set off an alarm or if what you're saying is it didn't set off an alarm because all that information could be easily gotten, why

doesn't that run against your argument as to what this language was meant to capture?

Why would you contract, as a matter of contract interpretation, why would you contract to require -- why would anybody contract to require disclosure of tons of stuff that isn't disclosed?

MR. ARMENIO: If we look at this one, 3.07, it is to seller's knowledge, the business is not in violation of any law and has complied in all material respects with the regulatory respects and guidance. This is the representation in 3.07. We are good corporate citizens, we are not breaking the law and we are not out of compliance since December 31, 2004.

THE COURT: That answers it with respect to 3.07 and the compliance provision. I guess that's right.

So your answer is well, even if all those -- well, I guess then the question is should CEPS, should all of the pricing conventions have been in there or is your answer no so long as they were in compliance?

MR. ARMENIO: For 3.07, the breach is the lack of compliance and the fact that they were in violation of law.

For 3.07, it doesn't matter, in my view, your Honor, whether the convention was in or not in the data room because it is 3M saying we haven't violated the law --

THE COURT: Right.

MR. ARMENIO: -- as defined, and they did. They

violated a regulation. At a minimum, they violated a stipulation. Then they said since December 31, we've complied in all material respects with regulatory requirements and industry guidance.

They didn't comply. By mid-April 2006 they were out of compliance with the regulatory requirement and the convention which was at a minimum an industry guidance of what CEPS should be doing. For 3.07, they breach regardless of whether the convention is in or not in the data room because they're not in compliance and they're in violation of law.

If your Honor would like to look, we can look further at Slide 87. I misspoke. Slide 85. This is the 3.12, disclosure of all material and assumed contracts. Now, this one there's really a couple of definitions going on. There is an assumed contract, capital A, capital C definition, and there is a material contract, capital M, capital C, and the assumed contracts are defined terms in the agreement and it lists all the things that would make it an assumed contract.

When we looked at contracts pursuant to which a third party purchases the products, it's the case that this could be an assumed contract, right, because CEPS conventions govern the price at which it is purchased, but the rep that is actually made is all material, sellers made available to purchase all material, lower case M, assumed contracts. If you have an assumed contract like a convention that's not material because

all it does is reflect the price that's --

THE COURT: So material assumed contracts would be a subset of assumed contracts?

MR. ARMENIO: Absolutely.

THE COURT: Now lets talk about why assumed contracts doesn't just at the end fall under what is set forth in Section 1.101 of the disclosure schedule.

MR. ARMENIO: When we look at that argument, our argument hasn't changed from the opening. I know we had the exchange with your Honor at the opening. If we read it their way, it is an absurd result.

THE COURT: So you're sophisticated parties. You contract, right? You contracted for certain language. Unless you can cite me a proposition of law that says I should read a different meaning into an absurd result -- and I don't think you have. What I think you need to do is walk me through some plausible reading of the words as they're written that you negotiated for and got that comes out to a different conclusion than that.

You wouldn't have written it that way, I gather?

MR. ARMENIO: Quinn Emanuel trial lawyers, yes, I wouldn't have been involved in writing it, your Honor. If we look at Section 312, it is from PX 305, let's put up the language. So they're saying this provides as of the date a complete list of every assumed contract referred to in clauses

1 through 11. So similar to what we mentioned in opening, there is no need for a 1 through 11 if it is just everything on the list is on the list.

Then it goes through further and talks about how certain of the assumed contracts need additional categories 1 through 7 and are, therefore, material contracts with a capital M. They say sellers made available to purchaser true and complete copies of all material, lower case M, assumed contracts. We know that didn't happen.

THE COURT: Now what we know is we have to go to the definition of assumed contract, don't we?

MR. ARMENIO: Yes, absolutely. So if we look at it, there are a variety of -- and it goes down and has 11 different aspects where it could be shall mean the following contracts, the contracts pursuant to which a third party purchases products from the seller, the contracts relating to the marketing of the products, the contracts relating to payment of rebates.

The construction that 3M wants is that this is then limited by only the things on Section 1.01 as opposed to this being a statement that these are the assumed contracts and we've put those on Article 1.1.

THE COURT: So what language could get into that reading?

MR. ARMENIO: I think as we'll set forth in our

conclusions of law, that is the fair reading that avoids the absurd result.

THE COURT: You'll cite me a case for the proposition that I should interpret the language to avoid the otherwise plain language, to avoid an absurd result.

MR. ARMENIO: We'll include all the authority we have on that point, your Honor.

THE COURT: Okay. All right. At pace, you concede that the language as written, seemingly plain meaning, even if it is somewhat absurd is the disclosure of everything that is being disclosed?

MR. ARMENIO: I don't, your Honor. I continue to believe that when read fairly, even avoiding and not having to resort to the case law, avoiding absurd results and the like --

THE COURT: That is what I want you to walk me through because I'm not there yet.

MR. ARMENIO: When I look at the language --

THE COURT: Use your pointer thing so we are talking about the actual words.

MR. ARMENIO: When I look at the language, the contracts pursuant to which a third party purchases the products from the seller, so I think there is agreement that one would be satisfied for the CEPS convention at issue here, and the language that everyone is focused on is "that are."

THE COURT: You wanted, "and between seller and that,"

right? Or no? That still wouldn't get you there.

MR. ARMENIO: I think quite frankly, if I had to put myself into the mind of the drafter, they had a "that which" problem.

It is really what is intended here is it means all the contracts pursuant to which a third party purchases the products from the seller which we're setting forth on the schedule as opposed to that which then defines introductory clause and limits it to that which is on the schedule.

Because then it doesn't make sense otherwise to have 11 categories of documents when they could have just said an assumed contract shall mean any contract listed in Section 1.01 A of the seller disclosure schedule, period.

That's how it would have been written if it means what 3M says it means. So I think reading it, number one, I think this is a "that which" problem. It is not meant there. It is saying this is an assumed contract, as your Honor said, maybe the words would have been much more clear if it said and we're putting it on 1.01, which, oh, by the way, is also on 1.01, but I don't believe it should properly be read to limiting it to only on 1.01 both in reading it and avoiding the absurd result of, well, they wouldn't have written it this way if they meant what is on the schedule is on the schedule. They just would have written it that way if that is what was intended.

If we look at what is on this document, the only

testimony regarding the intention of the parties in connection with contract drafting was from Mr. Larnholt.

THE COURT: Right, but I only get to caring about intent if you show me an ambiguity.

MR. ARMENIO: I believe, your Honor, at a minimum, having 11 different categories in an assumed contract definition that spans more than half a page, it is at least ambiguous whether it really is just assumed contract shall mean all of the contracts on Section 1.01 A, seller disclosure schedule, period.

THE COURT: So that the rest of that language would be superfluous is what you think leads to a conclusion of ambiguity?

MR. ARMENIO: I think it shows the superfluity of the rest of the language, shows it is not what the parties intended, so at a minimum the plain language is ambiguous so we look at it and understand well what was the intent here. Mr. Larnholt testified the intention was to be as broad as possible and get full disclosure. There was no contrary evidence from 3M.

The result, reading it again 3M's way, in addition to rendering all that contract language superfluous which is against fundamental contract interpretation maxims, would also render it absurd. It is absurd that a buyer would let a seller just dictate I'm telling you and representing to you what I'm

representing to you, and that's it. It makes no senses specially in the context of the overall agreement and in the context of the sale of this business.

There was some fight, and I think a case well, is it binding enough to be, is this convention binding enough to be a contract that would fall under the 3.12 requirement of disclosure. I think that has been resolved by the French law. Both the French law cited L-161-16-4. The price shall be set by agreement between the company and CEPS and violations of agreements shall be reported and prosecuted.

R-162-20-1, when changes in the sale price have been provided, the economic committee shall make sure the conditions for changes in the price have been met and the company shall forward the necessary items at least 40 days ahead. As Mr. Schur explained, that is an obligation. This is language of obligation.

Mr. Destal explained it very clearly that CEPS doesn't have to ask the funds of the company to lower the price. The company has to spontaneously lower the prices according to the obligations of the convention. This was certainly not an agreement to agree, not something that was nonbinding.

THE COURT: Did Mr. Destal ever testify that it was a contract?

MR. ARMENIO: What he testified to is that it is a regulatory act which reflects the agreement of the parties, so

it is both. It has this dual character, your Honor, under French law. It is a contract between CEPS and the company and it is a regular layer to act because it also governs the prices for pharmacists and patients and everybody else.

When they go to the pharmacy between April 12, 2003 and 2006, they paid 1710 euros governed by this convention. It was the law in France.

After that date in 2006, April 13, 2006, they were supposed to pay the generic price, but they didn't because 3M never honored its obligations under the convention. So it is both. CEPS and the company have a contract and it is a regulation that governs conduct law. We can see the contract aspect comes out in the cases. For example, Mr. Schur cites a drug company can be sued by a private citizen or another drug company for failure to comply with its CEPS obligations, and that is a suit to enforce them to honor their obligations under the CEPS convention.

If we look at it further, Mr. Schur actually talked about in his redirect what would be the language, what would be the effect of the language in a convention that was not a regulatory act in his view. He said it would be an administrative contract. He said it clearly on questioning from Mr. Renard. It wasn't a trick, it wasn't anything. It was on redirect. Even Mr. Schur admits that for those portions he doesn't believe are regulatory act, that language is an

administrative contract.

So I don't think really on the record we have from Mr. Destal, from Mr. Mariotte who actually speaks to this issue and from Mr. Schur that there can be any doubt there is a contract reflected in the convention and it should have been disclosed under Section 3.12 of the contract.

If we go ahead to Section 3.5 of the contract -- James, Slide 94, please -- this is another representation that 3M violated because it was supposed to provide all regulatory filings, and it represented it was also in compliance in all material respects with all regulatory filings and laws. It was supposed to provide them and it represented it was in compliance. Two parts, two representations in Section 3.15, 3M breached both.

When we look at regulatory filings, okay, regulatory filings, the definition includes a definition of marketing authorization.

THE COURT: Does this just turn into a redundant argument with with 3.07?

(Continued on next page)

MR. ARMENIO: I don't believe so, your Honor. Because this one turns on what is a regulatory filing. And there is additional specific language on regulatory filing. The definition is marketing authorization and related submission, including correspondence between seller and health authorities. And every person who got on that stand admitted that SEPS embodies a health authority, represents the health authority, is comprised of health authorities. Ms. Barreau was clear on that issue, as was every witness. SEPS is the government. And SEPS is comprised of government ministers from all of the other health authorities. There is no way out of SEPS being a health authority.

But even if you go further, the definition of marketing authorization, which is part of regulatory filings, includes lowercase marketing authorizations issued by a health authority. But then you can look past that, and even if the Court were not persuaded that SEPS was a health authority -- and we believe of course that it is -- marketing authorizations also include supplements or variations thereto, including all pricing and reimbursement approvals.

So there is clear language that even if SEPS were somehow not a health authority, all pricing and reimbursement approvals are part of the definition of marketing authorization, therefore part of the definition of regulatory filings -- capital R, capital F -- and 3M violated its

representations that it provided all of them and was in compliance.

THE COURT: Just grammatically marketing authorizations. So you want to say that the comma after territory -- well, you tell me. What does "thereto" refer to in that clause?

MR. ARMENIO: If we look at it with any supplements or variations, thereto would refer to everything that's being defined up front. Marketing authorizations, registrations, permits, licenses, for a product issued by a health authority. And then there is the extra language that's added, and it's added by Meda during the negotiations, and Mr. Larnholt testified to it, to make sure that it's capturing all pricing and reimbursement approvals.

Meda intended to add this. Mr. Larnholt testified to it. If we look at Larnholt declaration in 87 and 88, they changed the definition of marketing authorizations to add, including all pricing and reimbursement approvals. And we can see in JX 89, the actual markup that added this language is the same day of Meda's firm bid for the business.

This was an important factor. And Mr. Larnholt has explained, I believe, that this was important because Meda was a European company, 3M was an American company, and sometimes American companies get confused because the FDA doesn't do this pricing effort that happens in Europe, and this is added. So

this language captures it and was specifically added to capture pricing and reimbursement approvals.

And when we see from the conduct of 3M, they knew it was supposed to be in there. For example, the Giovanonni e-mail, JX 163A; the Brown e-mail, PX 182. 3M knew, the people in corporate charged with populating the data room, they knew it was supposed to be in there, pricing reimbursement, specific commitment that 3M can have regarding price.

Then they say, well, highly sensitive pricing discussions. At least identify the existence of such document in the appropriate placeholder. They knew that was supposed to be in the data room. They understood very clearly what they agreed to.

And when we talk about the documents, we see that they didn't follow their own compliance policy. They didn't follow their own Giovanonni e-mail and Brown e-mail to collect this stuff up. So they knew what they had to provide. And the evidence has shown they purposely didn't provide it. And I won't belabor the point. Mr. Carlinsky will go into it with what happened in France when Ms. Kolsky and others were asked to gather up this information and didn't do so. It didn't get in the data room. Mr. Sauer and Mr. Sampson knew about it. They didn't get it into the data room or otherwise disclose it.

So this language was added to the contract by Meda, for a particular reason, to capture these types of pricing

agreements, and there is undisputed testimony in the record from Mr. Larnholt on that. There is the undisputed markup of the document, JX 89. No contrary testimony or evidence of any kind from 3M that that was not the purpose for the addition.

So we look at health authority includes any government agency in a country responsible for licenses and approvals, clinical testing and manufacture or sale. So that gets us into the first half of marketing authorizations. But even if the Court is not persuaded that SEPS were a health authority, despite all the testimony and documents to that effect, at a minimum, these pricing and reimbursement approvals were specifically added with the intent to capture pricing conventions.

THE COURT: Go back. So that alternative reading, you would say that issued by a health authority refers to licenses?

MR. ARMENIO: If you look at health authority defined, it means any governmental agency in the country.

THE COURT: I understand the argument for health authority. But you're saying even if I am not persuaded, it's a pricing and reimbursement approval for a marketing authorization, right?

MR. ARMENIO: Correct.

THE COURT: Then you have to explain to me how I could skip over the language of health authority and just get to that, rather than seeing health authority language as

effectively modifying marketing authorizations and then only saying and all pricing and reimbursement approvals?

MR. ARMENIO: I think the best way to read it, the way I would propose it to be read, marketing authorizations means marketing authorizations, registrations, permits, and other licenses for a product issued by a health authority.

Now, I will pause there and I would say health authority, SEPS is one. And licenses, yes. SEPS gives a license and a permit for this drug to be sold in a pharmacy with a reimbursed price. And we heard that from everybody on the stand. You can't sell it with a reimbursed price until you go through SEPS. We saw 3M spend 400-plus days with its product not on the market because it needed the SEPS pricing approval. And it talks about these permits that permit development, manufacture, use or sale, and -- so it's in addition to these marketing authorizations, registrations permits, and licenses issued by the health authority -- and supplements and variations thereto, and it adds the language, including all pricing and reimbursement approvals.

So the clear intent of the language, both the plain language and the intent we put in evidence, is that supplements and variations thereto is meant to include pricing and reimbursement approvals. I think, given any supplements or variations thereto, including all pricing and reimbursement approvals, the plain reading of that is that whatever

supplements and variations thereto means, it includes pricing and reimbursement approvals. And we have the clear testimony of Mr. Larnholt, and the markup in the document, that's what they intended.

We also saw the conduct from 3M at least within the people initially populating the data room, that's how they understood it as well. Because that's what they did. They tried to collect it up, certain folks. Mr. Brown and Ms. Giovanonni, they tried to collect it up. They were thwarted by Kolsky and the others in France and Mr. Sauer and Mr. Sampson, but they tried to collect it up. So they knew what they were responsible for.

Let me just touch on good faith and fair dealing. Even if your Honor were to find that somehow through the three sections -- 3.07, 3.12, 3.15 -- 3M somehow did not have a duty to provide this information, and did not breach its obligations by being in violation without telling Meda, 3M still breached the covenant of good faith and fair dealing.

What we saw here, and the evidence was undisputed, Meda was a risk averse company and a risk averse acquirer. We saw that in the testimony of Mr. Lonner and Mr. Larnholt. And 3M's expert, Mr. Garrambone, admitted it. The company built its portfolio in licensing and product development and avoids risky situations.

THE COURT: Mr. Armenio, have you ever seen a case

where sophisticated parties negotiated fairly extensive disclosure requirements, but the one thing that they didn't include, which would be the structure of me getting to this argument, was the thing that really, really mattered, and therefore it was a breach of the covenant of good faith and fair dealing, and I should effectively add in that thing that was so important, yet you didn't capture it in the language? Can you cite me to a case for that proposition?

MR. ARMENIO: When we are putting together our conclusions of law, we are certainly addressing it. What I would focus on is two points. Number one, there is an underlying fraud here overall. So 3M cannot take refuge in the particular disclaimers and the particular --

THE COURT: That's a fraud claim.

MR. ARMENIO: -- limitations.

It also affects when we look at covenant of good faith and fair dealing.

Is it the case when I, as a careful draftsperson, I can make a line that only I, 3M, can see? Meda didn't see. Meda thought it was getting all material information. You heard Mr. Lonner and Larnholt say they believed and wanted all material information. That's what they believed they were getting. And what is not fair is if a company like 3M comes in and says, oh, well, I don't have to do it over here.

THE COURT: So you want to say that the fraud was so

deep and embedded and thought out that the drafting of this language was done to avoid disclosing this particular document.

MR. ARMENIO: What I am saying, your Honor, is that drafting of specific disclosures can't allow a company to avoid the fundamental value of the deal to the purchaser. What Meda wanted here, the fundamental thing Meda wanted was a stable cash cow business. That's what it wanted to buy. It asked for all material information in connection with its evaluation of the business. It believed it was receiving all material information. We believe it was not given that, and that there were multiple breaches of the contract that were a trigger by 3M not providing this information and not being in compliance with law.

But if we look at it, if 3M has a very literalistic view of these representations and believes there is somehow a way that you can get around all these representations and still deny the benefit of the bargain to Meda, which wanted as a risk averse company a stable cash cow business, that is per se a breach of the covenant of good faith and fair dealing. They knew exactly what Meda wanted. We want a stable cash cow business. We are risk averse. If they believe they can trace around and move and dodge and weave and get around these representations --

THE COURT: And hold you to the language of the contract that you bargained for.

MR. ARMENIO: The language of the contract that was bargained for, while 3M had full knowledge of what it was hiding, and Meda had no idea of what they were hiding and lying to us about, in effect, they want to hold Meda to say, oh, you said what we told you was enough.

THE COURT: So your implied covenant argument turns -- to get there I need to find not only that there was not a breach, but that there is a fraud.

MR. ARMENIO: I don't think your Honor needs to find as far as fraud to find a covenant of good faith and fair dealing. Fraud has its own higher standard.

THE COURT: You said it was a fraud. I understood that to mean as legally defined.

MR. ARMENIO: It is certainly a fraud and Mr. Carlinsky will speak to that. But if we take a step back, did 3M know information, and by withholding that information, denied Meda the benefit of its bargain? I think the answers to those two things are abundantly clear. Mr. Sampson and Mr. Sauer sat on the stand and testified, they knew of the risk, they knew of the convention, and they didn't tell Meda. They knew Meda, as a risk averse company, it wanted a stable cash cow business. They knew there was a risk.

Mr. Sauer admitted, on your Honor's own questioning, an important risk that could be up to even 40 percent, and yet they said nothing. In that kind of situation, they are denying

Meda the benefit of the bargain Meda sought. Meda believed it was being told everything. But if somehow there is an overly literal reading of these representations that 3M can somehow get around all of them, and hide a pricing agreement on the most important product, in the most important country, if that's somehow outside of violating the contract -- again, I don't believe it is -- but if that's somehow outside, it's fundamentally depriving Meda of the benefit of its bargain.

So I don't think it has to go all the way to fraud to prove that breach of covenant and fair dealing. To me it's first principle. I want a stable cash cow business. Please tell me everything so I can decide whether to buy to.

Meda, this is a wonderful stable cash cow business, with EBITDA growing, stable and consistent earnings, no problems. Mr. Lonner, Mr. Sampson, have you told me everything I need to know? Sure, there is nothing. In the data room, anything? Nothing.

They buy what they think is a stable cash cow business, and it is not. They get the letter from SEPS cutting the biggest product in the biggest market. They were fundamentally denied the benefit of their bargain. And when 3M tries to say, we negotiated for these very precise limitations in the contract, they didn't negotiate with equal knowledge. They did not. And by manipulating the lack of equal knowledge, Meda ended up buying a business that didn't exist. Meda wanted

to buy a stable cash cow business. They were selling a business they knew was risky, with declining growth, they needed to sell, their CEO was saying it's a pity we didn't do it last year.

THE COURT: No buyer knows what will be disclosed when they are drafting their disclosure requirements, right? The whole point is to draft language that will capture everything that you think could be there.

MR. ARMENIO: I think the unequivocal evidence from Mr. Schur, Mr. Garrambone, and all the witnesses is that everyone in the industry would expect a pricing agreement on the most important product in the most important country to the business to be disclosed as a matter of fundamental business ethics. Mr. Schur and Mr. Garrambone said that. Mr. Garrambone said -- at Pfizer, what would you have done -- either we would have disclosed it or we would have cleaned it up first before going through the sale process.

So at a minimum, there is the expectations that an agreement of this magnitude -- most important product, most important country -- is going to be disclosed regardless of what the lawyers end up doting the Is and crossing the Ts on. This is too big. This is the elephant. It has to be disclosed.

THE COURT: You have gone for an hour. Just one question on that. If the most important thing was purchasing a

stable company with an even stable cash flow, couldn't you have done some kind of warrantee for that? Can't at the end of the day you contract for what it is that is most important to you?

MR. ARMENIO: There is language available that we have all seen in contracts. What the problem was here is there was nothing that 3M ever said to put Meda on even the remoteness notice that it might need such language. Everything they said about the business was that it was stable, it was consistent, it was going great. They never said anything that would alert a prospective purchaser that they might need some of the protections that your Honor mentions. If 3M had said anything about specific price risks of Tambocor CR, I think that would be a different situation. They didn't.

THE COURT: So this is a theory of contract, which is seller must do a certain amount of disclosing before we can have the information we need to go into contracting what we think we need to protect us?

MR. ARMENIO: I think what it is is in contract law and in fraud law, if you're going to speak about something, you can't lie, number one, and you can't speak halfway and give half-truths. And everything 3M did misrepresented the business to Meda as being stable and a cash cow, when they knew that was a lie. They knew that was not the situation. And we can even see from the EBITDA valuation that Meda used. They used the valuation, as explained by Mr. Larnholt, that you use for a

stable cash cow business. If it had been a risky business, it would have even been valued differently. So everything 3M did to present the business was to present it as a stable cash cow business, attractive to Meda, and hide the reality. And they succeeded. But I think I need to cede the floor to Mr. Carlinsky.

THE COURT: He is getting nervous.

MR. CARLINSKY: Your Honor, this was a fraud, and if we can turn to, let's start on slide 103.

Here are the elements. I am not going to spend time now. We will brief those for the Court.

If we can flip to slide number 4, James.

We know the materiality of this SEPS convention. We have to remember what we are talking about here. This is not a minor product in a minor country. This product Tambocor CR was the flagship product. It was the featured product, as you heard from Sauer and Sampson. When we look at the offering memo, when we look at the management presentation, it is really all about Tambocor CR. And I note that when Mr. Keel testified, a 15 percent price reduction to the legacy product IR, which, of course, happened in early '06, was big news. Imagine the big news with a 50 percent price reduction on CR, the flagship featured product.

These are slides that I am not going to spend time on, other than there is no question here that in France, and I am

going to start in France, they knew exactly what the convention provided for and what the risks were associated with Article 2.2. Mr. Traineau said --

THE COURT: Is this your scienter argument?

MR. CARLINSKY: It is all part of the scienter argument. And what I think is clear here was a deliberate cover-up.

So Mr. Traineau says, of course we know what the language was, and he talked about how it had to be overcome. And the Court asked, when was that pressure or the risks associated ultimately going to present itself? Somewhere in 2006. And even Ms. Barreau, who fought to try to explain away the convention, recognized it would at a minimum be the starting point of any discussions Mr. Renaudin.

We saw this slide. This is the e-mail JX 163A, on April 20, that goes out in Europe, and it of course asks for lots of different documents that are supposed to populate the data room, but it specifically identifies pricing reimbursement and it talks about specific commitment that 3M could have regarding price. It cannot be more clear, specific commitment regarding price. And what happens? The next day, as we see in JX 163A, Ms. Kolsky, who receives this request, Ms. Kolsky in 163A --

THE COURT: Slow down a little bit. I am going to give both sides some additional time.

MR. CARLINSKY: Let me put on the elmo for a minute 163A. This is Kolsky's e-mail, the very next day. It's part of the long chain. She has just received, specifically, Ms. Giovanonni's e-mail that we looked at, which talks about, among other things, the collection of specific commitments, pricing, the price and reimbursement, the dossier, summary of the price dossier.

THE COURT: What is the (volume clause ...)? Did we get any testimony on that?

MR. CARLINSKY: We don't have any testimony on that, but we do have Mr. Wanlass who recognizes this reference, because it's then picked up in some documents we are going to see following on this document, where Mr. Brown is talking about these references. Mr. Wanlass, the 30(b) representative, testifies, yes, I understood this to be referring to the Tambocor CR convention. And we will see that in a moment.

But we don't even have to question it because we know, we have Kolsky here, who receives this, and what she says is, we have been pulling together all of the documents that have been requested, with the exception of one, which she says, I am unable to respond without having received your guarantee. And she goes on to talk about, since it is required for each subsidiary to provide the specific price/volume clauses, and she identifies specifically Flecaine, and she says, these should remain confidential. So her message is, I am not

produces these unless you, and who does it go to, a list of names that we have all become familiar with, Mr. Traineau, Husson, Delspy and Biffaud, members of the Flecaine steering committee.

So that's what happens on the 21st. I will leave that up there for your Honor. And what she is saying is, I am not going to produce this document even though it's clearly been called for.

Next slide, please.

Now we have PX 182. This is Mr. Ian Brown, who has been identified as the lawyer in the UK responsible for the due diligence efforts for the UK and Europe. And he writes, There has been some question about what should be done with highly sensitive/confidential documents (e.g., highly sensitive government pricing discussions). If you determine that the documents are relevant and material, but are too sensitive in the first round, we suggest you identify the existence and indicate in a folder that it will be available upon request.

We then have another e-mail from Mr. Brown on May 16 where he says, if agreements are so commercially sensitive, we would not want to disclose them at this stage, but only disclose them at a subsequent stage when we knew the buyer was serious. Please indicate, slip folder or some kind of a slip sheet. And he says, I know that in one country, for example, this is the route that has been followed with some particularly

sensitive government contracts. He is talking, of course, about the Tambocor or the French pricing agreements.

THE COURT: You say agreements or agreement?

MR. CARLINSKY: He is referring in the plural. But what Mr. Wanlass says, I understood that reference to be a reference to the Tambocor CR price convention. He testified to that.

But the more important point is, your Honor, he is testifying, what ultimately happens? He says, I know no slip sheet was put in, even though that was what was supposed to have happened, and he can't tell us why not. So the witness charged with answering the question of Ms. Kolsky, you say you're not going to produce it. Mr. Brown, you're focused on this issue. It's not as if somebody can legitimately say, well, we kind of never even focused on it. We have direct attention focused on this issue, and we have no answer provided by Mr. Wanlass nor from any witness who has come in here to testify.

THE COURT: But is one plausible answer that they screwed up?

MR. CARLINSKY: One plausible answer is they screwed up, if Mr. Wanlass had done the investigation and come in here and testified that, I spoke to team people, I asked Ian Brown, how is this issue resolved, and he told me that it was a screw-up, or if he talked to Mr. Kolsky and came in and said,

Kolsky ultimately produced the document to Ian Brown and it sat in his files and somehow it was not ultimately disclosed.

THE COURT: It was their burden to explain it?

MR. CARLINSKY: It was their burden to explain it. Once there was a 30(b)(6) witness, charged with that duty to investigate and ultimately come forward and testify on that issue, it was their duty.

THE COURT: But he came forward and he said he didn't know.

MR. CARLINSKY: He came forward and said, I don't know because I didn't speak to any of them. His entire investigation amounted to one thing only. I spoke to outside counsel, and I reviewed documents that were cherry-picked.

But there is another point I want to make, your Honor, which is let's go to 108.

The same Kolsky that we just saw on April 21 saying, I am not going to produce these documents, telling the steering committee, remember -- I'm sorry. Here is 108. Remember this e-mail from Kolsky, PX 194A, on May 30, how she is talking about the consequences of the delay.

By the way, what I would like to show your Honor is we saw the e-mail from Kolsky which is -- let's go back to the elmo -- April 21, which is JX 163. The day before, and this is JX 163A, here is Kolsky, and she is writing to her cronies on the steering committee, and she talking about the delays

associated with Tambocor and the materials going to the transparency committee. The day before she writes, This estimate is favorable to the preservation of the estimate of the operating plan of 2006."

So the day before she is saying essentially good news, the whole entire SEPS negotiation is going to be pushed off. The next day, on April 21, she is saying, I'm not producing to the data room the convention. And then a month later, if we can go back to slide 108, she talks about and is celebrating the consequences of the delay.

A 2006 operating plan, Q3 and Q4, unmarred by any reduction in the price of Flecaine. And then look at that last line, your Honor. "A more attractive image of France pharma for prospective buyers between now and the fall than there will be at the end of the negotiation."

Your Honor, in fraud cases you don't typically get someone who says, I admit I am committing fraud. But I will tell your Honor, in my experience, that's as close as it gets. We are dressing up this business. We are creating an attractive image, a false image, but an attractive image. Why? Because we are not going to produce the convention, and we are going to push off these negotiations, because if the negotiations had happened during the period of the sale, it wouldn't have been just red flags that would have gone off. It would have been red flares. Because all of a sudden there

would have been a price reduction, and all of a sudden Meda would have said, wait a minute, what's going on here?

And what Kolsky here, and we are going to see some of her later e-mails -- if we go to the next slide, please -- this is the very next day, she is writing again to the steering committee, I am pleased with your remarks since I tried yesterday to postpone this meeting with HAS in our best interest. And then, of course, after the fact, in November of 2006, the same Kolsky -- and I am making the link back to, I'm not producing this convention unless you tell me, steering committee, that's who her e-mail April 21 went to -- she says, they are celebrating that they have managed to push off the delay of the file in order to preserve the price of Flecaine IR and CR until the end of the year 2006 and the non-application of the specific clause.

Now, next slide. Again, we have no explanation. Mr. Wanlass says, well, it was a mistake, but I don't have any evidence. I am just deducing that because there were some documents that were cherry-picked for me to see.

THE COURT: Can you go back one?

MR. CARLINSKY: Yes.

THE COURT: So the re-registration date has passed, largely passed. And we have delayed, in order to preserve the price, until the end of the year 2006, and the non-application of the specific clause.

MR. CARLINSKY: Yes.

THE COURT: Isn't that consistent with their theory, which is that the whole effort was to get a non-application of this clause having been successful in that?

MR. CARLINSKY: First of all, they should have disclosed the agreement because every witness recognized the significant risk associated with the agreement. What these documents are telling us, and in fact go back to the prior document where she is talking about a prettier image for the business, what she is saying, and she recognizes, if we go back a couple of slides, a better image than there will be at the end of the negotiation. She is recognizing that when we get to the end of the negotiation, there is going to be a price decrease.

THE COURT: But again, so their theory, the whole game here, the whole pricing game, is time. And so that's what the currency of the negotiation is -- not currency, but that's the goal, get more time, time is money, and so, of course, what we will show is we have successfully pushed for more time.

MR. CARLINSKY: They are clearly pushing for more time. They are clearly trying to delay. But why are they trying to delay at that point, your Honor? They are trying to delay it because Meda is an interested buyer. Meda doesn't know about any of this information. And if they can delay it as opposed to the negotiation happens and Renaudin says, I am

enforcing and I want 50 percent or 40 percent, that's going to send up red flares. And Meda, as Mr. Keel recognized in one of his documents that we looked at, they had no back-up plan. They had no other buyers. Mr. Keel recognized a sketchy process. Any issue that comes up is a surprise.

That's what Ms. Kolsky is talking about here. Let's push this off so that when this business is being looked at as we are selling it, it will look more attractive than it ultimately really will be. And whether it was delayed because they thought they were going to be able to delay things, or it was delayed because they were hiding it, they had an obligation, if we are buying the business, if Meda is buying the business, to disclose it, so Meda can understand what the risk is. We know what happens after when SEPS comes and says, we expect 50 percent. But this is all delay, delay, delay, and don't tell Meda.

Now, that's France. We now know, because Mr. Sampson and Mr. Sauer took the stand -- if we can go to 112 -- we now know in addition, and, your Honor, I don't think it's an overstatement to say that Mr. Sampson admitted to fraud. Mr. Sampson admitted he learned of the convention by May of 2006. He learned of it from Mr. Traineau. He testified at 842 that the convention that he was being told about harks back to 2003. So we know exactly what convention we are talking about. And there was a need for 3M to try and go back and negotiate, try

to go back and negotiate. That's part of Mr. Sampson's testimony.

Next slide, please. Then he was asked, and he testified, I remember that pricing is a challenge, and that there was a convention that existed that may have required 3M to change its price.

And he was asked, do you remember that there was a discussion that the alternative to a price -- he is describing his meeting with Traineau when he is learning about the convention in May of '06. And he says, I remember that as an alternative was the launch of a generic or the equivalent of a generic. He remembers being told that. And he also testified that with respect to the price option, understood that the price risk was to do with generic price levels. Never said it was unclear, didn't understand it. He talks about what he was told. Then he was asked, did you see in the materials when this was ultimately coming due? And he said, the convention laid out what they expected to happen. This is Mr. Sampson's testimony.

Next slide. Of course he knew the significance of Tambocor. 82 percent of the business's operating profits, and now he is aware that this product is subject to a significant serious price risk.

Next slide, please. So what happens?

Let's actually jump to 116 for a minute.

He was the most senior executive. He had responsibility for the management, presentation and approval of all of the disclosures. Mr. Lonner testified, I asked Mr. Sampson at the management presentation. When was that, your Honor? That's in June. That's the month after Sampson knows from the French team of this pricing convention.

"In the presentation, Mr. Sampson, did you say anything to Meda to advise them of what you had learned a month earlier?"

"I did not."

Go back a slide, 115. DX 255, which is in evidence. Mr. Sampson spent -- in fact, I have it here, but in the interest of time -- Mr. Sampson spent two days in September with Meda where they were negotiating the acquisition agreement, two days.

Now, why is that important? Mr. Sampson gave us a whole litany of excuses why he didn't disclose what he had learned, and one of them was, well, I didn't know whether they were serious yet. But then by August 30, Meda submits a binding offer, and now they are meeting in Minnesota to negotiate the acquisition agreement. And Sampson is there for two entire days; he is in every meeting session with Meda. Does he say a word? Not a word.

I asked him, What about after the acquisition agreement was signed, or at any point in time, did you ever

pick up the phone to say, you should know that there is a significant risk associated with the business, the European business that you're buying and you're paying $850 million for? Perhaps you see the risk differently than us. Anything. Not a word. Mr. Sampson sat there with full knowledge and didn't say a word.

Now, if we can go to Mr. Sauer. Mr. Sauer testified he was involved in numerous discussions in '05 and '06 with Traineau and Biffaud in which they warned him of, his wards, an important risk to the price of Flecaine. He admitted that among the scenarios he was told was a 40 percent price decrease.

Next slide, please. And your Honor asked a great question. We were talking about -- you're looking at me. Does that mean time is almost up?

THE COURT: Yes. You have been going 85 minutes. You had 90 minutes. I am going to extend each side by 20 minutes. So if you want to reserve 20, you have got five.

MR. CARLINSKY: Your Honor asked a question, the document that Mr. Sauer ultimately testified he was asked about when he conducted his investigation after the issues arose, and he said, I learned that a document had not been turned over. And then your Honor asked this question:

"Do you connect that document to the information that was being conveyed about the risk of a price reduction for

Tambocor CR due to government pressures?"

He says, "I do."

So a critical point is it was the convention that created the risk. The risk that he was being told about when he was meeting with the French team, not general pricing pressures in Europe or in France, but a specific risk tied to a particular document, namely, the convention, that ultimately wasn't disclosed.

Next slide. I asked Mr. Sauer, "Knowing what you" knew, why didn't you tell Meda?"

Answer: "It wasn't my role."

I asked him, "Whose role would it have been?"

Answer: "The people leading the process. John Sampson."

We know John Sampson, of course, stayed silent throughout.

Next slide. I asked Mr. Sauer about why in the 500 page long, or whatever, 150 page long offering memorandum, or in the management presentation, there couldn't have been one sentence? Your Honor will remember I focused on there was a sentence in there about Aldara going up 5 percent. They found room for that one sentence. Yet Tambocor CR, and we are going to look very quickly at how much feature there is of Tambocor CR, they couldn't put in one sentence, one sentence that said, you should be aware that there is a specific risk of price

reduction associated with this drug. But they didn't. And what does that tell us? That tells us guilty minds.

Next slide, please, 121. This is the slide regarding Aldara. They put in that one sentence about a 5 percent price increase accentuating the positive, because it was an important drug in the U.S. Well, what was more important than Tambocor CR in Europe? Nothing.

Then, of course, we have the next slide 122. This was a document in January of '07. This is JX 113, where again the business is celebrating the very good job done to postpone further price negotiation with authorities beyond 2006, one of the key achievements. Why? Because they sold the business and Meda was the schnook who had no idea this was all going on and ultimately the purchase price was as full and robust as they could possibly ever have imagined.

Next slide, please.

So let's just quickly remember. The offering memoranda, it references Tambocor CR up 46 percent year-over-year. And each witness, Sampson and Sauer, admitted no disclosure at all anywhere in the offering memoranda that would put the reader on notice or give them any inclination that that product was at risk of a price decrease.

You're talking all about this product. Where is that one sentence that gives the fair presentation. As Mr. Armenio said, when you open your mouth and you make those kinds of

representations, you can't decide to tell just the part that you like and leave out. That's fraud. This, your Honor, was fraud.

Next slide, please. Again, there is a reference specifically about, As patients in France switch from Tambocor IR to CR, some of these general pricing issues may be offset. And I asked Mr. Sauer and Mr. Sampson, that was telling the reader that the reason there is an offset is because Tambocor CR is selling at a much higher price. They agreed. They also agreed nothing there would indicate to a reader, oh, by the way, you have this time bomb ticking inside your business because there is this price convention that any moment in time SEPS is going to say 50 percent. Not a word. Yet they are talking about all the positives.

We have this slide, and I won't spend much time on it. Price evolution. Why is this in here? It gives these statements about health economic approach to optimizing pricing, pricing processes in place. Both, again, Sauer and Sampson, nothing there that would indicate to a reader that there is a risk of a Tambocor CR price reduction, even though they both full well know there is at the point of this management presentation. Those slides are there to mask. Not only didn't they disclose, they deceived. These were designed to mask the truth so nobody would ask the question because everything looked copacetic.

Next slide. We saw this. Tambocor CR sales. They both acknowledged, it was a positive statement, and it was in their purposefully to be a positive statement. So a reader looking at that would think, boy, this is a great product that I am buying.

Then the next slide, of course, Mr. Sampson tried to explain, well, there was no disclosure, but there was something about flattening cardio sales. And, of course, when confronted with this slide, he was forced to admit that, as he says, when I asked him, would you agree no reader reading this would conclude that Tambocor CR in France was at risk of a material price reduction, it is very difficult to tell from that. And he admitted from that slide, the top box of PX 421 shows CR continuing to grow.

So, again, where is the footnote, the sentence, whatever it is, to say, but you should know? It's not there and Sampson ultimately approved it.

Next slide. We can skip motive, but this Court has heard enormous motive. This business, to put it charitably, was an absolute dog, a dog they couldn't get rid of quickly enough. And what Mr. Buckley says is, too bad we waited a year.

The next slide. Sauer, as of September 16, we have no backups if necessary. Imagine if Meda got word of this price reduction risk?

And then we have, of course, the results. They took a gamble here, your Honor, a gamble. They maximized. They got so much more money than they ever imagined they would for this business. Their bogey was $725 million for the entirety of the business. They got a loan for Europe, 850-something million dollars. And as Mr. Sauer told the board of directors, we greatly exceeded our fears for this challenged business. Of course they did. And they took a gamble and they didn't disclose the convention because the only buyer for Europe would have either ran for the exit or would have said we want a purchase price reduction. Just like Meda did, as we saw in Mr. Keel's testimony, any time an issue that affected potentially the revenues, any time an issue arose that they became aware of. You remember there was a point where in Mr. Keel's testimony Meda learned that in Germany they might not get $2 million of revenue. First thing they said was we want a purchase price reduction. So they kept all of this quiet because they didn't want to scare off Meda.

The last point I just want to end on, we now see in the findings of fact that 3M proposed that there are disclaimers here, and the disclaimers effectively disclaim any reliance on extra-contractual representations.

I just want to say, and we will brief this for your Honor, if we go to slide 133, this has been the law in New York for over a 100 years. And the law is, if you know something

and you deliberately hide it, you cannot rely upon -- actually, let's go to the next one, *Jackson v. State*. The next slide is even better. You can put in disclaimers, but the one thing a disclaimer does not relieve you of is a willful misrepresentation. It may apply to an innocent mistake, but not to a willful misrepresentation. And from that doctrine back in 1925 in the *Jackson* case, we know multiple courts have recognized, and certainly the law in New York is clear, that when information is peculiarly within the knowledge of the seller here, as this Article 2.2 was, there is no validity to a disclaimer. It doesn't apply. It doesn't immunize you from liability. We cite two cases, and we will certainly provide the Court with more case law.

Then the last point on this is at slide 137, which is the other doctrine relating to disclaimers, and that is a disclaimer must be specific if it's going to have any enforceability. It must track the substance of the alleged misrepresentation. And general disclaimers --

THE COURT: No dispute you're a sophisticated party?

MR. CARLINSKY: No dispute. By the way, this law makes it clear, although I don't know have the quote on the board, the case law is clear -- there it is, the *JP Morgan* case. The law does not stand for the extraordinary proposition that a general sweeping disclaimer can serve to disclaim any and all extrinsic fraud between sophisticated parties. The

touchstone is specificity. And why is that, your Honor? Because if you have a specific disclaimer, that might be either the red arrow or the red flag or the something that might tell the other party, who is in complete oblivion at that point, well, they are disclaiming something specific.

So if they said you should not trust our projections for Tambocor CR, or they said something specific to Tambocor CR, or the projections upon which it was based, specific disclaimers, then perhaps the disclaimer would have validity. Because then what it would do is it would send the message, OK, we are being told something here, we should focus. But a general disclaimer as a matter of law just doesn't do it.

Thank you, your Honor.

THE COURT: We will take a break before we start with Mr. Renard. One question on reasonable reliance.

In your view, and based on the testimony, what would a reasonable purchaser have thought, given general pricing reductions and what was going on in Europe and going on in France, given the history of the drug, what would they have thought the price trajectory looked like?

MR. CARLINSKY: I think the answer was from the witnesses. They expected the price of Tambocor CR to stay where it was. And Mr. Biffaud testified, of course, they were working to try to convince SEPS not to reduce the price. He too said, we were hoping and thought we could maintain the

price of the drug at what it was.

So to answer your Honor's question, I think the reasonable assumption here was the price would be maintained. We know that at the end of the year, after the acquisition agreement is signed, we have Mr. Traineau who mentions that there is a risk of 10 percent. Traineau, the man who knows about this, the man who tells Sampson about it, says there is a 10 percent price risk. Based upon what? Nothing about the convention. He says, when this comes up for renegotiation, as these conventions do every five years, there is a 10 percent price risk. That's the extent it.

So at most, maybe, maybe there is an expectation that there could be a 10 percent price risk as part of just the regular ordinary negotiations. But that's not even mentioned until the document is signed. An explanation is given that Mr. Traineau's operating plan already somehow factors that in.

So in answer to your Honor's question, I think, from Meda's standpoint, when you have the documents themselves, the two documents that are used to sell this business, and they are so heavily focused on Tambocor CR, it's like if I sell McDonald's and I don't tell you that the Big Mac, which of course is my best seller, but the Tambocor CR was the Big Mac, and not to tell somebody that I have agreed to reduce the price of the Big Mac by 50 percent, and I am not telling you that when I sell you the business, it's unheard of.

THE COURT: A reasonable purchaser would have thought it would stay the same price forever?

MR. CARLINSKY: At least through patent expiration.

THE COURT: So that's 2009.

MR. CARLINSKY: Yes.

Actually, in the case of Meda, they also recognize that notwithstanding patent expiration, given the nature of this drug, and the very serious condition which it ultimately treated, there is an expectation that even past that patent expiration, the price could be maintained, maybe not precisely at what level it was, perhaps it might have had some pressure downward, but not that it was going to be effectively supplanted by a generic, because the expectation here was this drug, cardiologists were not going to move their patients who have this very serious condition to a different drug.

So I think the reasonable purchaser here, and Meda was the reasonable purchaser here, expected the price to stay. And nothing that 3M told it gave it any reason to think otherwise, when you look at all of those very positive statements.

THE COURT: Surely, the expiration of the patent is going to produce a risk of a price reduction, right?

MR. CARLINSKY: Yes. A risk that Meda thought was quite low in terms of a price reduction or supplanting by a generic.

THE COURT: Whose testimony was that?

MR. CARLINSKY: Mr. Dierks' testimony. I think it's in his declaration. He makes that point particularly clear.

Look, your Honor, you don't ever have a fraud case where somebody walks in and says, you have got me, or has the confession note. As the Court knows, you look at motive and opportunity. It is more than ample here. You look at conscious behavior and knowledge. Sampson and Sauer have the knowledge. Sampson has the knowledge and is sitting in the room with the Meda executives. Mr. Lonner said they talked about pricing issues, and he asks, of course, what else should I know about? There is no plausible excuse why at that point, at a minimum, Sampson didn't disclose what he had learned. Just a month earlier, just a month earlier.

And when you look at it in the context of all those positive statements, again, all about how great Tambocor CR is, and the featured flagship product, you sell your McDonald's and you talk about the Big Mac being the greatest thing and it's going to take you into the next century, and you don't mention you have an agreement to cut the price by 50 percent? Regardless of how you evaluated the risk. Even if you didn't believe it to be a 100 percent certainty, or a 90 percent certainty, how is it that you don't disclose it? The answer is obvious.

(Continued on next page)

MR. CARLINSKY: It is because it is fraud, because it had to unload the dog and they didn't want to do anything to upset that process.

THE COURT: Thank you. We'll take a 10-minute break. I'll still allow a 20 minute opportunity for rebuttal. Mr. Renard, I'll even add to your time. So you'll have two hours, Mr. Renard.

MR. RENARD: Thank your Honor.

THE COURT: I'll just figure out exactly how we are going to do this. We'll see you then.

(Recess)

THE COURT: Let's be seated.

Mr. Renard, whenever you're ready.

MR. RENARD: Thank you, your Honor.

May it please the court. Your Honor, when Meda filed this lawsuit against my clients, and throughout the pretrial period of this case, and up to and including the opening statement, it made five what we believe essential representations to this Court:

Number one, that product pricing information was critical to Meda. In conducting its due diligence, in making its decision to agree to acquire 3M's pharmaceutical business covering 81 countries, the defined capital T-territory, and that information was so material to its decision to acquire that business, that that's the overriding consideration in its

acquisition of the pharmaceutical business;

Number two, 3M was required to disclose but fraudulently concealed from Meda --

THE COURT: Sorry. I don't understand. Number one, you're saying product pricing information was critical?

MR. RENARD: Critical. That is an essential premise of their case to this Court.

THE COURT: You're telling me about their case?

MR. RENARD: Yes.

THE COURT: Sorry. I thought you were telling me your case. For a second I thought you were making my life easy.

MR. RENARD: It is good we clarified that.

Number two, 3M was required to disclose, but fraudulently concealed from Meda one particular pricing reimbursement convention regarding one particular product in one particular country; namely, the March 2003 convention which contained Article 2.2 relating to Tambocor CR in France

Number three, that that convention, or at least Article 2.2, was in existence and was in full force and effect as of November 8, 2006 when the parties executed the acquisition agreement, and also at the subsequent closing on January 2, 2007, and that 3M was in breach of a mandate to reduce by 50 percent the price of Tambocor CR;

Number four, that Meda was completely unaware of the existence of Article 2.2 and its implications prior to the

closing and didn't find out about its existence until alternatively, and this date kept moving, until February 2007, the Fall of 2007 and later December of 2007;

Number five, that had it known of that information, Meda -- and now they say or any reasonable buyer -- would have paid over $210 million less for that pharmaceutical business covering that 81-country territory.

Your Honor, now that the trial is completed and the evidence is in the record, we state with a great degree of confidence that the record evidence does not support any of those five essential representations that Meda has made with respect to both its breach of contract case and its fraud case. In fact, the evidence demonstrates to the contrary.

We, your Honor, like the court, think in boxes, at least thought of boxes in terms of how we were to present what we thought was the critical information and arguments to the court. For that reason, your Honor, we are not going to proceed in a chronological background or great degree of background facts because I believe that there are some issues that the court needs to address, wanted to address and wanted to look for during this trial. At least that was our take on things, your Honor.

Consequently, we have come up with six points we would like to discuss in our time today:

Number one, 3M had no obligation to disclose the CEPS

conventions but, in any event, Meda knew that those conventions had not been provided and never even asked to see them, an overriding consideration, your Honor, that has consequences both with respect to Meda's breach of warranty claim but also with respect to its fraud claim;

Number two, we would like to discuss the nature of CEPS conventions with an eye towards the French law that is applicable to those conventions;

With that background, we would like to take a look at Article 2.2, whether or not it mandated a reduction as Meda asserts in this case of the price of Tambocor CR.

Number four, your Honor, and this is important, understandably was not addressed in Meda's closing argument, Article 2.2 was not even in effect at the time of the acquisition agreement and subsequent closing, and that has major consequences both with respect to its fraud claim and also with respect to its warranty claim.

Number five, Meda has failed to prove a breach of warranty or a fraud.

Of course, number six, Meda has failed to demonstrate any recoverable damages.

Those are the boxes, your Honor, that we would like to present to the court today, and obviously if your Honor wants to take any of those out of order, we're certainly prepared to do so.

Dealing to the first question presented, was 3M even obligated to provide the CEPS conventions to Meda and did Meda know those conventions had not been provided? An interesting component of the acquisition agreement on which Meda sues, all of the representations and warranties appear in Article III of the acquisition agreement. Article III contains a preamble. An important of that preamble is except as specifically contemplated by this agreement, seller represents and warrants to purchaser that all the statements contained in this Article III are true.

In other words, the representations and warranties, including 3.07, 3.12 and 3.15, are subject to whatever exceptions exist elsewhere in the agreement. Of course, there is a major exception, your Honor, and we talked about this.

Section 5.02, which begins, and I would say apropos of the preamble to Article III, notwithstanding anything contained in this or any other agreement executed on or prior to the date hereof, seller shall not have any obligation to make available to purchaser any information if making such information available would contravene any applicable law or any binding agreement including a confidentiality agreement.

Your Honor, as we know --

THE COURT: Go back. Dot, dot, dot, provided that seller, upon the reasonable request of purchaser, will provide purchaser with a complete and accurate description of --

MR. RENARD: Absolutely, your Honor.

THE COURT: How does that work?

MR. RENARD: The way it worked here is there is -- we will discuss this in greater detail within this box, but there was never any inquiry, and that is the most interesting thing that I think came out of the testimony of Meda's four executives, and those are the only fact witnesses, the top four executives. There was never any inquiry from a party who is coming to this Court and saying product pricing information was all important to our determination of evaluating this opportunity and deciding whether to close.

No question whatsoever about product pricing, agreements with governments, conventions, anything. In fact, as the court may recall, I asked Mr. Dierks who was probably the most knowledgeable about CEPS conventions and the whole European reimbursement product pricing scheme, Mr. Dierks, including the fact that he didn't see and knew that there weren't any conventions in the data room, I said did you ever see any due diligence material prepared internally by Meda, any memos, any reports, any e-mails that made any reference whatsoever to product pricing, and his answer was no.

There was never any inquiry about this, your Honor. Of course, we know, however, that there were discussions, including those by Mr. Traineau, prior to closing, in which he talked about the negotiating history with CEPS, the history of

the conventions with CEPS, and also the existence of Article 2.2 and the fact that he had been stricken out in the most recent amendment to a convention that CEPS and 3M had executed. This was the meeting that took place November 28, 2006.

He did inform Meda of that. Mr. Traineau testified about at length in his declaration. He reconfirmed it on cross-examination, and I think the only thing that Meda says, can say in response to that is frankly, Mr. Traineau must be lying.

Your Honor, I respectfully submit given the gentleman's demeanor and the way he answered questions and his general presentation, there is no basis other than Mr. Lonner and Mr. Dierks saying I don't recall him ever talking about this.

Well, there was another person in that meeting, Mr. Vant Hullenaar, who works with Meda, wasn't presented as a witness, did testify in his deposition he did recall Mr. Traineau bringing up the subject of negotiations with CEPS, the 10 percent price decrease estimate, but the point being, your Honor, yes, we did put Meda on notice of Article 2.2, its history, the fact it had been stricken out. The point being with respect to 5.02, there was never the question, there was never the predicate request for information, shall cooperate in any requests to otherwise enable disclosure of this. That was never asserted, your Honor. Consequently --

THE COURT: How would it work?

Setting aside what your contentions are here, if there were something that could be shown to fall within one of the subparts here, if the purchaser didn't know about it, how could that request be made?

MR. RENARD: Your Honor, the purchaser certainly knew about CEPS conventions.

THE COURT: I am asking a hypothetical.

MR. RENARD: In that hypothetical, your Honor, I am not sure other than it does put the onus on the buyer in this case to request --

THE COURT: So a buyer has to ask affirmatively about information that is by definition confidential?

MR. RENARD: Perhaps, your Honor, hypothetically in that situation, understanding that wasn't this case, the buyer would say is there anything that would otherwise have to be made available pursuant to Section 3.12, 3.15 or some other warranty in Article III of the acquisition agreement that you have not provided because --

THE COURT: Well, we have Mr. Lonner testimony, right, that -- Mr. Lonner who testified that he asked -- maybe it was Mr. Larnholt, I am forgetting who, but the testimony from that meeting where he testified that he asked if there was anything else.

MR. RENARD: Your Honor, that was a general question

put at the very beginning of due diligence. This was June 26, 2006. Mr. Lonner says he asked Mr. Sampson is there anything else that I should know about? And Mr. Sampson, according to Mr. Lonner, said no.

Your Honor, that is hardly the --

THE COURT: Back to my hypothetical. That is the meaning of this provision, if you have something that is by definition confidential, how would the purchaser know to ask for a factual description?

MR. RENARD: Your Honor, I would say given the existence of this, to ask whether or not anything has been withheld, as a result of knowing of the existence of 5.02?

THE COURT: Yes.

MR. RENARD: A hypothetical buyer would say look, there are some representations --

THE COURT: So you're saying the question should be is there anything that pursuant to 5.02 has been withheld on the basis of what is contained in 5.02?

MR. RENARD: Yes, your Honor, because otherwise you do have the right on the part of the seller here, again using the same language that was negotiated between sophisticated parties, and even assuming, and I will show later that none of these warranties even applies to the CEPS conventions, that even assuming that they did apply, the sophisticated parties here negotiated a provision that said look, the seller, here

3M, may refrain from producing information that might otherwise be obligated to produce if, in fact, it is subject to either a confidentiality agreement with a third party, number one; or, number two, contravenes some applicable law. That was a right, your Honor, that 3M had.

THE COURT: What testimony do you think establishes those propositions here?

MR. RENARD: Your Honor, it is not testimony.

THE COURT: No, no. That is what 2.2 is?

MR. RENARD: Yes, your Honor.

THE COURT: It falls within one of these provisions?

MR. RENARD: Yes, your Honor.

As your Honor knows, and what we'll be dealing with this in a bit, conventions are set up under French law pursuant to social security code Section L-162-17-R. And that allows, your Honor, for conventions to be amended, to be replaced chronologically in sequences Mr. Schur testified about.

This March 10, 2003 convention, which is the subject of Meda's pleading, and has heard time and time again, your Honor, went out of existence on the very next convention which was a full convention dated November 17, 2003. That convention, your Honor, contained a confidentiality provision. That is Article 4.1. The parties reciprocally undertake to respect its confidentiality. Your Honor, it was the November 17, 2003 convention --

THE COURT: There is no comparable provision in the March 2003?

MR. RENARD: That's correct, your Honor, but understand that the representations and warranties had to do with then existing contracts and then existing regulatory acts. There wasn't an obligation anywhere in the warranties and representations that they're suing on that required 3M to put together the historical record of, in other words, old contracts, old conventions, old agreements with governmental entities or private parties.

THE COURT: So for me, for this to matter to me, I have to, I have to agree with your contention that the March 2003 convention was no longer in effect?

MR. RENARD: Yes, your Honor, yes, with respect to this contractual limitation.

THE COURT: If I disagree with that proposition, then this provision has no bearing?

MR. RENARD: Your Honor, this provision would certainly have a bearing with respect to the November 17, 2003 convention and every amendment to it, and it was amended in September of 2004, it was amended in August of 2005, and as the court knows, it was amended again on September 15th, 2006.

Those were all amendments to the convention, dated November 17, 2003, which we believe merely makes the point that the March 10, 2003 convention went out of existence when this

later convention was executed between CEPS and 3M Sante.

Your Honor, it was this confidentiality provision which continued to exist with each and every annual amendment in '04, '05 and '06 through the date of closing and through the acquisition agreement and it contained this confidentiality provision.

THE COURT: The language the parties reciprocally undertake to respect its confidentiality? What testimony is there regarding whether that language or evidence -- I don't mean just testimony -- is the same as what 5.02 requires?

MR. RENARD: Your Honor, 5.02, of course, requires that there be a confidentiality agreement. We have the words the parties reciprocally undertake. Obviously, you have undertaking between two parties so it is not a unilateral undertaking to respect its confidentiality.

Your Honor, in terms of testimony, witness testimony, what that means, there is none whatsoever in this case. All we know is this Article 4.1 came into existence in November '03 and continued to exist through the transaction contained this sentence which appears to us and I think should be reasonably construed as a confidentiality agreement.

THE COURT: This reminds me of the 2.2 language.

MR. RENARD: I think it is clear in Article 2.2.

THE COURT: I bet you do!

MR. RENARD: Of course, Mr. Schur testified, and we'll

talk more about this notion of abrogation and supersession with respect to CEPS conventions that it did contain a confidentiality clause, we construed it to be such. In addition to that --

THE COURT: Sorry. I was thinking about something.

MR. RENARD: That has to do, your Honor, with the notion of a confidentiality agreement between CEPS and 3M Sante with respect to this convention and all of its amendments.

In addition, as you recall, Section 5.02 (b) of the acquisition agreement provides for the ability to withhold from provision material information if it is otherwise prohibited by law. Mr. Dierks' testimony at trial was, in response to one of my questions, was Meda in convention with CEPS. Mr. Dierks stated he didn't believe he could do so, and that is to putting it mildly given the competition laws of Europe.

Is it 3M's position they withheld the document because of 5.02 and the confidentiality requirement?

MR. RENARD: Your Honor, I think we need to break this down into two chronological segments because there has been some confusion I think in terms of what was going on.

There was a due diligence period that included the electronic data room. That due diligence period which began roughly the tail end of June and ran up shortly before the execution of the acquisition agreement was not governed by the acquisition agreement, the acquisition agreement coming into in

effect November of 2006.

What we were dealing with prior to the acquisition agreement was a process. The court has seen this. In fact, counsel has used Ian Brown's memo about where he recognizes that, look, pricing information is at a minimum sensitive and we don't want to be giving this out. We think the process ought to be putting slip sheets in, allowing the person conducting the due diligence -- this is prior to the acquisition agreement ever being executed -- to at least know of the existence of this agreements.

Then we can deal with whether or not later we describe these agreements, whether or not we make them available to prospective buyers, but that will come later in the process, and that is where Mr. Wanlass testified about. That contemplated process early on process in the due diligence process was not followed. That was unfortunate.

Following that, though, your Honor, we have the acquisition agreement that has Section 5.02. Clearly 3M believed that these pricing agreements and these conventions not just with France, we are talking about an 81-country territory, was very sensitive information.

The parties negotiated Section 5.2 (b) into the agreements, your Honor, and that provision allowed 3M not to, in fact, make those conventions available to Meda.

THE COURT: Is it 3M's position that but for that

provision, they would have?

MR. RENARD: Your Honor, no -- obviously, there was -- no because, among other things, those CEPS conventions don't fit within 3.07, 3.12 and 3.15. There was no obligation to do so. The decision had been made during the due diligence process not to provide these documents, instead to have these slip sheets. That didn't happen.

Your Honor, whether or not they would have had made them available had it not been for Section 502 (b), your Honor, it is our position that there was no obligation under 3.07, 3.12 and 3.15 to make these available in any event.

This, your Honor, is the beginning point to the argument with respect to there was no obligation because of 5.02 to make them available, and more importantly, your Honor, can Meda claim it was misled by not having been provided with the CEPS conventions? And the answer is no.

We believe that the contractual confidentiality provision, the reciprocal obligation on the part of CEPS and 3M Sante in that November 17, Note 3 convention as well as just the general competition laws within Europe, prohibited us from making those CEPS conventions or any other similar information available to Meda.

But was there any request with respect to getting these conventions, any information about these conventions and the responses? No, Meda never asked. You can recall, and I

talked about Mr. Dierks' testimony, your Honor, with respect to not having ever seen anything internally created by Meda that suggested any interest whatsoever in specific product pricing as to specific products.

Mr. Keel testified, and he was the one leading the effort with respect to this sale, that he had countless conversations with Meda's executives, hundreds of e-mails, dozens of hours on the phone and never once did the subject of product pricing come up. In fact, the electronic data room inquiry log, your Honor, which is in evidence, will show that of the 105 formal questions that were put to 3M in connection with the due diligence, not a single one related to product pricing.

Mr. Dierks -- and this, your Honor, is sort of the interesting revelation in this case -- it was presented as, you know, among this haystack, there was a missing, one missing needle and that was this 2003 convention. That was this convention that revealed the existence of Article 2.2.

Mr. Dierks kind of set that argument up, if you will, in his trial declaration in which he said lots of Meda employees including myself spent time reviewing documents in the data room. He specifically recalls looking at sales and marketing information. I did not come across any information related to a -- and look how he narrowly defines this -- a signed agreement in France mandating either a price reduction

to Tambocor CR or introduction of generic version of CR, et cetera, no such agreement was ever brought to my attention.

Your Honor questioned Mr. Dierks on the stand, in fact, essentially using that language in his declaration and said you don't recall specifically looking at documents relating to this signed agreement mandating a price reduction? Did you come across any other CEPS conventions including any annual renewals? The answer was no.

And then, your Honor, what I thought was revealing, given the fact again that this acquisition related not just to France, frankly not just to Europe, but 81 different countries, most of which have some reimbursement and social security state sponsored medical support, shouldn't there be a bulk of documents that show published prices? Answer: Yes.

I am assuming they weren't there. Is that right, they weren't? No, they weren't, according to my knowledge.

Mr. Larnholt was asked the same thing. Were there any CEPS conventions in the electronic data room? I don't think so.

Mr. Wanlass was talking again about the fact there were no slip sheets for any pricing convention for any product in Europe.

Mr. Shah, the due diligence expert for Meda, actually duplicated what apparently Meda's employees did, that is to go into the electronic data room. He didn't see any CEPS

conventions in there, didn't see any other similar information with respect to any other of the countries in this 81-country territory, but certainly Meda was aware of these conventions and these pricing agreements.

Your Honor, here we have a fraud case and a breach of warranty case which is based upon an alleged failure to provide a specific document.

THE COURT: But I asked I think Mr. Armenio about this, and obviously this was on my mind, but I understood the thrust of the breach of disclosure argument to be premised on the fact that this was a convention that they're arguing was in violation, that there was a breach, and that that is what isolates it to a single document as opposed to what presumably would be a lot of documents that show pricing.

MR. RENARD: Your Honor, there are two kinds of warranties, if you will, on which Meda is suing. There are the warranties that say I have given you a particular category of documents.

THE COURT: Right.

MR. RENARD: 3.12 is assumed contracts, 3.15 is regulatory filings.

THE COURT: Right.

MR. RENARD: Then you have the representations. I'm talking about whether or not there was any obligation --

THE COURT: You're not talking about 3.07?

MR. RENARD: This is talking about an obligation to provide, to physically give over or --

THE COURT: Really we are talking about 3.12?

MR. RENARD: And 3.15, regulatory filings. There is a similar -- we have made available all regulatory filings very much similar to 3.12.

THE COURT: Can you get the language so I can get my eyes on it?

(Pause)

MR. RENARD: Page 61, here it is, your Honor, on the screen.

THE COURT: Yes.

MR. RENARD: All existing regulatory filings are set forth on Section 3.15 of -- as provided with access, et cetera.

THE COURT: Right.

MR. RENARD: Go back then to Page 17, your Honor, with respect to this notion of you never provided me this document so I could look at it and understand the consequences of it. The problem, if you will, your Honor, for Meda is much greater than that. Meda understood that there was an entire class, an entire category of documents.

Whether or not we were obligated to provide those under any of these specific warranties or representations, they were aware that there is this entire class of information that had not been provided to them, that they say was of such

critical importance to their decisions, and they reduce it down. In fact, you even heard that argument by counsel this morning, and that is well, it didn't matter whether or not this entire class was given to it, we wanted to know those conventions and pricing agreements that had specific information.

Well, your Honor, the problem with that is one of the things they're suing on is you didn't give us a document that was within a much broader class of information.

THE COURT: You want to say to set aside 3.07, but you want to say if you're right, Meda, about your interpretation of 3.12 and 3.15, then you're admitting that there was a whole bunch of material that anybody doing any kind of minimal diligence would have seen was not disclosed?

MR. RENARD: In fact, it goes to with respect to fraud, Merrill Lynch, a plaintiff may not satisfy its burden by simply pointing to warranties for the purposes of showing fraud that it knew were false.

THE COURT: If you're right, that deals with 3.12 and 3.15, but not 3.07.

MR. RENARD: That's correct. Recall we were talking about the very beginning, the title of this particular section, "Was 3M obligated to provide the CEPS conventions?"

That gets us a fair ways in the contract analysis to deal with the physical delivery or physical availability. It

just wasn't there. There was no obligation because of the contractual confidentiality clause and general competition law.

THE COURT: Tell me how the 5.02 would interact with the 3.07 violation? It is not a disclosure of the agreement.

If I think there is a 3.07 violation, it would be disclosure of noncompliance which presumably wouldn't run into a 5.02 problem, right?

MR. RENARD: Yes, your Honor. We recall 5.02 deals with making information available, and that is the bit line down. We can go to Page 18, please.

To complete the thought, your Honor, one, there was no obligation we believe under 5.02 independent of the specific contractual languages we have on 3.12 and 3.15 to make these CEPS conventions available, both because of contract as well as prevailing law, but even beyond that the fact that Meda, knowing full well of the absence of this universe of documents that the court correctly said would fill boxes, volume of information, not once asking for it knowing it wasn't there yet claiming it was of such critical importance, undercuts the argument this information was of critical importance to them generally.

Your Honor, a perfect example of that -- and forgetting price reduction agreements, and we'll talk about whether 2.2 was truly a price reduction agreement -- recall Mr. Dierks, I asked whether he was aware of these rebate provisions

that exist in a lot of conventions. These are the provisions that rather counterintuitively if you sell too much of a product or product beyond what is set forth in an agreement with CEPS, then you end up giving more money back in, like a rebate provision or retroactive discount. He said he was aware of such provisions if you're buying a company, pharmaceutical company, and you're aware of these rebate provisions in France and similar jurisdictions, you would want to know because that would affect the value of the assets that you're buying.

And yet using the rebate provision as a perfect example, Meda for whatever reason, and I think the reason had to do with how they approached the valuation of this company and what they were looking for in terms of synergies and the like, but that aside, that Meda would never have asked to see that information, never questioned it.

You have to draw the conclusion that that just wasn't material to their decision to purchase these assets. Then you take that one step further, and knowing full well whether it is 3 percent, which was Mr. Dierks' offhand estimate of how many conventions actually have special provisions, I think it is much greater than that, but we don't need to go there. That is not an evidentiary dispute in this trial.

The fact you have the possibility there are these provisions and Meda was not even interested in them tells you a lot about the truth of their assertion this information was

material because they never looked at it, there were no internship documents that showed that they even cared about it, that they even recorded down prices.

Your Honor, I think that belies the notion that this was material and belies the notion that they now can retroactively, with 20/20 hindsight, go back and say this stuff was of such key importance to us, we had to have it, knowing the full universe of that wasn't there.

With that, your Honor, I would like to go to the next box. This box is a small one, but I think it set up a discussion about what is the nature of Article 2.2 as well as whether Article 2.2 even existed as of the date of the acquisition agreement.

I mentioned this particular article. I have it memorized because it is probably the most important one in the French social security code. This is the basic statute, 162-17-R that sets up what a convention is. It says the economic committee, CEPS, may enter into agreements with businesses for maximum duration of four years in relation to one or more medications.

I'll stop there for a second.

Do you recall Mr. Destal coming up with a theory, and that I think is being charitable in connection with what it was, this theory of symmetrical conventions, that you have a product-specific convention that can only be amended by another

product-specific convention, these annual portfolio-wide conventions can only be modified by another annual portfolio-wide convention. Your Honor, that doesn't exist anywhere in French law.

It is interesting here that the prelude to 162-17-R talks about agreements that relate to one, that would be a product specific convention, or more medications which would include the annual portfolio-wide medications. Those agreements determine the relationship between the committee and each business, and in particular, and these are the two main things that conventions do for the purposes of this case:

Number one, set forth the price or the declared sales price;

Number two, the means by which the business participates in the implementation of the aforesaid ministerial guidelines. Those are the guidelines referred to in the very first line.

Your Honor, Mr. Schur testified about the distention between price-setting provisions and that second, the means by which businesses participate in the implementation. It has to do, your Honor, with the distinction between regulatory acts and administrative agreements. You'll recall that Mr. Schur testified that the price-fixing provisions of a convention -- and again "convention" is not to be distinguished between annual conventions and product-specific conventions because

this statute does not such thing -- the provision that sets the prices is regulatory. Why is that? It means it is administrative legislation. It is regulatory act.

Why is it a regulatory act? Because, your Honor, it affects the relationship between parties who are not part of this convention but the general population, and that is pharmacists who actually sell these reimbursable drugs and the general public, the patients who purchase them. That is why the pricing-specific provisions are regulatory acts.

I asked him then about Article 2, and this was in reference to the March 2003 convention, is that a regulatory act? And he said no, because it doesn't fix a price or provide a clause or a formula that fixes a price.

We talked about well, are there portions of conventions that are not regulatory acts? And Mr. Schur said certainly, and he gave an example what I just described; rebate provisions. Why is that not a public act, your Honor? Because that concerns the relationship solely between CEPS and the drug manufacturer. That would be an administrative agreement.

There is a difference. Regulatory acts being legislative in nature affecting parties other than those to the convention and administrative agreements that are between CEPS and the drug company that enter into them, a key distinction for going forward in terms of what these provisions mean and what Section 2.2 means.

Another provision that is important in the French social security code is 162.20, and this says an agreement concluded pursuant to, and we just saw one of those articles records, 162-17-4, between business acting as commercial operator and CEPS may be altered by means of a writer at the request of the business or of the committee. You can have amendments to these conventions, product-specific or annual, done at the instigation of either CEPS or a drug manufacturer.

That takes us then to the inquiry what did Article 2.2 mean and did it require a specific reduction in the reimbursement price of Tambocor CR. We have all seen this language. It doesn't become any clearer with each passing reference, but it was important to put this again in front of us.

Article 2.2, which was part of the March 2003 convention, in fact, came into being as a result of that convention, essentially set forth an optional process, if you will. The laboratory agrees to take all necessary steps to ensure that at the end of a three-year period dating from the publication of the official journal from the prices of the proprietary drugs of Article 2 of Table 1, Tambocor CR, an equivalent of each of these proprietary drugs, or failing that, each of these proprietary drugs are placed on the market at the price of the generic drug corresponding to these proprietary drugs.

One thing we know for sure, your Honor, that at no time between March 2003 and April 12 of 2006, which I think marked that three-year period, was there any generic drug corresponding to Tambocor CR. That is an undisputed fact. So what Meda says is well, what 2.2 required that 3M Sante had the place on the market or actually had to reduce the price of Tambocor CR to its generic equivalent, and I should say its hypothetical generic equivalent because that generic was not on the market at the time.

The key part of Meda's argument, your Honor, was that this was a certain fixed formula for determining what the price should be from April 12, 2006, and it is simply not. There is no formula in there. Mr. Schur's testimony was saying in order for there to be an enforceable price change clause, you have to have the price specified by amount or you have to have a formula by which you can determine a fixed amount.

He further said if you have a clause that requires a modification of a price in the future, all CEPS needs to do is to publish the price, and that's in the statute, your Honor. Counsel brought out Mr. Destal's testimony that oh, no, no, if there is an enforceable price change clause, the drug manufacturer simply drops the price of its drug. That is not true. You have to have the new price published by CEPS. It is CEPS that puts into effect a price change.

However, in order to do that pursuant to a price

change clause, you have to have a clause in an enforceable convention that says come X date, the price of this drug will drop to Y euros, or if in the future something happens, then your price will be reduced to X euros or X percent of what it presently stands at, something that you can sink your teeth in.

THE COURT: It seemed like -- and one thing I asked Mr. Schur about -- something new was going on in 2.2, right; that is to say, it seems that there was this I think even pursuant to Mr. Schur's testimony, an early implementation of a new policy towards counter generics.

MR. RENARD: The minister's guidelines which was a letter addressed to CEPS which found their way then into each of the annual reports of CEPS which set forth their policies, those guidelines had come out on December 24, 2002. In fact, that was one of the reasons why there was a delay in getting this initial convention for Tambocor CR, because CEPS was telling us we're going to have this minister guidelines coming out soon, you have to wait for those. That was a key reason for the delay. The guideline was going to come out and it was going to change the landscape of reimbursing in France.

It did. Mr. Schur said he believed, based on the wording of Article 2.2, that 2.2 was an attempt by CEPS to essentially incorporate the policies that had been announced pursuant to the minister guidelines. In fact, he believes this may well have been the first case where there was a pricing

convention that attempted in a rough and ready sense --

THE COURT: What I struggle with is how, then, to -- he had a pretty rigid doctrinal analysis. You need to see X, Y and Z in order for it to be this, but was interposing that lens on something that was admittedly new.

MR. RENARD: Yes, your Honor, but the ministerial guidelines -- and we'll talk about that in a minute -- the effect that it had in terms of this notion that Meda was seeing calm seas for the next several years until 2009, that there wasn't any real prospect of a price reduction. Your Honor, that is nonsense given the minister's guidelines and the policies that were stated by CEPS in each of its successive annual guidelines. This was an attempt to come up with a rough and ready sense of administering and applying those ministry guidelines.

THE COURT: Why couldn't it have been -- how is it inconsistent with Mr. Schur's testimony that there were these guidelines, but that what CEPS was trying to do here was a sort of rigid application of that approach?

That is to say, not aspirational and not negotiable, but we've got this new policy and now we need to implement it, and here's that first shot of implementing it and, therefore, moving it into a different category than simply the same thing that is produced as a policy statement?

MR. RENARD: Two things could have been done in this

convention. One was to set forth a price, a date and specific by euro or percentage reduction in what Tambocor CR was going to be. Or, two, your Honor --

THE COURT: The date we have, right? We have three years?

MR. RENARD: Yes, three years.

THE COURT: Sorry. Three years?

MR. RENARD: The point being, your Honor, is that -- and Mr. Schur talks about this -- CEPS knows what it is doing and could easily have written a clause here.

THE COURT: He kind of said CEPS didn't know what it was doing and this was confusing and he couldn't make out what "equivalent" meant. It was a little -- I don't know, there was something, something odd about the notion that at some point CEPS wants to do this, it could do this. I don't know what it was doing here. I don't think CEPS knew what it was doing here.

MR. RENARD: Maybe we ought to work backwards. There is a way to write a provision that makes it abundantly clear there is an obligation on a particular date to drop a price by a fixed percentage for a fixed amount of euros. That is not Article 2.2.

THE COURT: There is surely a clear way to do that, no doubt.

MR. RENARD: Yes, absolutely.

THE COURT: No doubt this isn't that.

MR. RENARD: It is not that.

THE COURT: What testimony is there that would establish -- this is part of Mr. Schur's testimony -- because it wasn't clear, it, therefore, couldn't do that?

MR. RENARD: Your Honor, it comes in a set-up here Mr. Schur is saying you could have --

THE COURT: Sometimes laws aren't written clearly.

MR. RENARD: That's correct. Your Honor, it comes with this. As I said, the linchpin of Meda's argument that this was an enforceable and valid price change clause is that there was no doubt about it, it required a 50 percent reduction in the price of Tambocor CR because that is the price at which any generic would have been introduced upon the market. That is a misreading -- as I think it was clear during Mr. Schur's redirect examination -- of what the policies actually say.

This was a policy, your Honor, in effect in 2006.

THE COURT: The point here, and you can include this in your briefing, is that generic prices can be negotiated, too?

MR. RENARD: Absolutely.

THE COURT: So it can't be mechanically a 50 percent reduction.

MR. RENARD: What does that mean when we're talking about having a price of Tambocor CR at the level of a generic

when a generic can be negotiated with CEPS at any level and, your Honor, that is exactly what Mr. Schur was talking about. If somebody wants to introduce a generic, to negotiate a price with CEPS? Can a company do that? Absolutely. That is not -- I didn't spend quite enough time on this.

This was a policy that said generic manufacturer, you're guaranteed at least a price if you put a generic on the market of 50 percent of the brand name product against which with you're competing.

THE COURT: So a floor?

MR. RENARD: A floor and not a ceiling. Yet that has been misconstrued by Meda as saying this policy, as articulated here, is what made that a certain fixed price change provision and made Article 2.2 enforceable.

This is why we are talking about, your Honor, why Mr. Schur, and it just wasn't rhetoric on his part, it was his expert opinion what Article 2.2 really did, it was aspirational in the sense of saying we're going to have to sit down and conduct a negotiation when this three-year convention comes to an end in 2006.

It was an agreement to agree not because we say so, but because that is what the language said. If you're to introduce a price at a level that was negotiable, then you could only effect a change of price if you again sat down with CEPS in 2006 and negotiated and came up --

THE COURT: Could you go back to the generic one.

So that would mean then that 2.2 would suggest that you would see if there were no further discussions of 50 percent price reduction?

MR. RENARD: If, if 3M did not want to negotiate it, then yes.

THE COURT: To set the price reduction of 50 percent, the level of which, as the level of which the price proposed should be accepted without discussion. Okay, so if there were no discussion at the time that the 2.2 language hits, it's 50 percent reduction, but you would say with room to negotiate up.

MR. RENARD: All of which is in the power of the pharmaceutical company to determine whether it wants to engage or not engage with CEPS in connection with setting a generic price.

As Mr. Schur said, you can get a higher price or lower percentage reduction for the pre-generic price. Your Honor, that was even borne out by the fact if one looks at -- and we will here in a little bit -- the pricing history of the generic equivalent to Tambocor IR, the immediate release version, went from at various levels 65 to 75 to a hundred percent of what Tambocor IR was, no 50 percent.

THE COURT: Does that mean that what, in your view and Mr. Schur's view, what 2.2 means, that in three years CEPS is going to treat LP like a generic?

MR. RENARD: CEPS is going to negotiate a price reduction.

THE COURT: As if it were negotiating a price reduction on a generic?

MR. RENARD: Your Honor, that would be the upshot of 2.2. However, we also know in the communications with CEPS that they -- by the way, I have to say this. We talk about the optional nature of 2.2, the first part being the introduction of the generic.

Your Honor, Mr. Biffaud in his trial declaration, Paragraphs 33 and 34, he said he replaced Mr. Felber in July of 2003. One of the first things I did -- Paragraph 34 -- in that role was to advise Mr. Renaudin that 3M would not allow generic versions of Flecaine LP into the market prior to the expiration of its patent, one of the actions contemplated by Article 2.2 of the March 2003 convention.

An interesting point chronologically, Mr. Biffaud, coming in and taking Mr. Felber's place, and that conversation with Mr. Renaudin took place between March 2003 convention and the November 17, 2003 convention, which didn't have Article 2.2, but I just wanted to address that first half of the option and then we're dealing with the second half. It was clear, your Honor, both from CEPS' communications with 3M as well as 3M's expectations in its communications with CEPS, it was envisioning after three years it would be sitting down both

because of the expiration of the convention, that November 17, 2003 convention was a three-year convention by its terms, it was going to expire in 2006, also the registration of Tambocor CR, and your Honor, registration, that is the market authorization issued by the actual health authority that allows for safety and effectiveness purposes, the drug to be sold on the market, that was coming up for renewal in 2006. So you had these two events coinciding which necessarily required a new negotiation with CEPS.

THE COURT: Just to bring it back into some of the contract, the acquisition agreement language, it seems like even as you're -- tell me why this is wrong -- even as you're describing it, that if you're right about focusing on the generic language, what 2.2 meant was without discussion, one in three years LP is going to be negotiated like a generic; and, therefore, without discussion, we are looking at a 50 percent price reduction but the possibility of negotiating up.

So then going back to 3.07, could you talk about -- this may be taking you out of your bucket order -- the language around industry guidance and stipulation that Mr. Armenio spent time focusing on.

MR. RENARD: It does segue into what was my next box to address, and that was Article 2.2 even in effect at the time of the acquisition agreement. On that we believe absolutely not, and we think the credible evidence --

THE COURT: So I can check off a box, does that mean do I think if it was in effect, under your theory, it is at minimum industry guidance or stipulation.

MR. RENARD: To call that industry guidance is incorrect.

THE COURT: In light of how Mr. Schur testified about it, it sounded to me like industry guidance.

MR. RENARD: Your Honor, what we would be talking about under 3.07 was whether or not there was a violation of a regulatory act or a law. When we talk about a violation, again what Article 2.2 necessarily required was another convention to be executed by CEPS and by 3M Sante because you couldn't --

THE COURT: Just a second to focus on the language of 3.07, since December 31, 2004, seller has complied in all material respects with all applicable regulatory requirements and all industry guidance concerning the marketing, promotion and distribution of Meda's natural products.

You wanted to take me back into regulatory requirements, but I am asking you based on the language to talk to me about after the "and" all industry guidance concerning the marketing, promotion, et cetera.

MR. RENARD: Again 3M Sante was in accordance with not only any regulatory acts, any agreements that it reached with CEPS, but also any industry guidance.

THE COURT: How is that?

MR. RENARD: Because, your Honor, it necessarily required you could not unilaterally drop the price of Tambocor CR. You can't do that. In order to drop the price --

THE COURT: So you're equating industry guidance with unilaterally dropping the price?

MR. RENARD: No, your Honor. We are talking ultimately about Article 2.2, whether it is industry guidance or regulatory act or a contract, we are talking about whether or not we were acting in accordance with Article 2.2 to the extent it existed.

The point under Article 2.2, that second option about pricing, it necessarily required a conversation leading to a convention, a new convention between CEPS and 3M Sante. You couldn't unilaterally drop the price. A new price to be issued by CEPS, and in order to get there, you needed a new convention.

What we did -- and we will be looking at this in a moment -- in January of 2006, as we were required to do, we made a new application for CEPS in connection with our renewal of our registration and asked CEPS to consider a recommended and proposed price. The proposed price that was put into that application for renewal was 17.10 euros, and a case was made in that application why that price ought to be maintained. That was done well in advance of the April 12, 2003 so-called deadline they say applied under Article 2.2.

What happened next?

In August, your Honor, we get a draft amendment to the November 17, 2003 convention that has in it as the reimbursable price for Tambocor CR 17.10 euros. It also had an annex, too, and we are going to talk about this that had Article 2.2. It was stricken. It was countersigned by Mr. Renaudin, and isn't it interesting that that 17.10 percent price was the first and only price offered by CEPS when Meda took over and entered into its first convention in 2007.

The notion that 3M was in violation of Article 2.2 by doing what it did, knowing that there was going to have to be a new convention with CEPS in order to put a new price into effect, given the fact there wasn't a price certain stated in Article 2.2, 3M did what it had to do. It approached CEPS, it proposed a price. CEPS respond by providing in the very next convention that was executed by the parties, a convention that had 17.10 euros in it.

That is the notion, this notion that there was some violation, some thumbing the nose at CEPS, your Honor, that was the behavior of the two parties to the very next CEPS convention.

So to suggest that somehow we violated, we were in breach of, we were thumbing our nose at some obligation doesn't wash. There was to be another negotiation and, in fact, another negotiation took place and another convention was

executed.

Article 2.2, no matter what point you look at, April 12, 2003, or running up to November 8, 2006 when the acquisition agreement was executed, there was no violation of that. 3M did the only thing 3M could have done, and that is go to CEPS and say okay, let's start negotiating. What emerged from that was a September 15, 2006 convention that had 17.10 euros, not a 50 percent reduction, not a 25 percent reduction.

It stayed at the same price, and that was the outcome, your Honor, of that negotiation that took place in April of 2006.

(Continued on next page)

MR. RENARD: Mr. Schur, of course, was talking about how this provision could have been written in a way that --

THE COURT: What evidence is there in concert to the information put forth in the letters and the like from Mr. Renaudin after the fact sort of revising, if that's what it is, 2.2 and talking about it in obligatory language?

MR. RENARD: That occurred in the tail end of 2007, 2008. What I would say is interesting is what SEPS actually did. After 2.2 was stricken from the September '06 amendment, executed by 3M and by SEPS, you had the transaction take place. The marketing authorization --

THE COURT: It strikes through the price too.

MR. RENARD: It strikes through the price in Annex 4, but the price is also stated in Annex 3, which is the annex that matters with respect to price.

You have Annex 4, which is the special terms. That was stricken out, it was initialed, and it was sent to SEPS, and it was countersigned by Mr. Renaudin. That didn't attempt to strike out the Article 3 price and that's the price that matters.

THE COURT: I interrupted you on the way to answering the question about what to make about how Mr. Renaudin talked about 2.2 after the fact.

MR. RENARD: Your Honor, it's interesting. In the plaintiff's complaint, and you didn't hear about this in the

trial, but in their complaint, they say that Mr. Christian Senac, who was the country manager for Meda France, had a conversation with Mr. Renaudin in February of 2007 talking about this.

What is interesting is that the very first convention that Meda executes with SEPS in September of 2007 carries forward exactly what the parties had agreed to in the September 2006 convention between 3M and SEPS, namely, a 17.10 euro reimbursable price and no Article 2.2. It's not in there. It wasn't even proposed.

Then, your Honor, we roll forward, and Mr. Renaudin, in connection with negotiations with Meda, first saying we are going to enforce our policies, we are going to make sure that Tambocor CR goes down in accordance with our policies, refers back to Article 2.2. He does. And it ends up being talked about in the negotiations. 2.2 never ends up being in any convention between Meda and SEPS.

I think as Mr. Schur said it, and said it well, SEPS knows what it's doing. And if SEPS truly believed that Article 2.2 survived and was still in existence even after that September '06 amendment, it would have been in that September '07 convention, the first one that Meda executed with SEPS at a time when Meda had taken over the rights of Tambocor CR. It wasn't there. It didn't even come into the discussions until later.

So, your Honor, we can look at what Mr. Renaudin said in his negotiations, but we can also look at what SEPS, as a committee, did in connection with entering into these agreements with Meda. It wasn't there. In fact, as it turns out --

THE COURT: Couldn't that just be evidence that Renaudin is brightly pointing out the existence of it and the committee has the authority not to enforce it, that is, it exists, but they are open to negotiation?

MR. RENARD: I think Mr. Renaudin, rather than saying continue to exist, was harkening back to that there was this Article 2.2 and using it in terms of negotiating with SEPS.

The fact of the matter is, and this was with SEPS' clear approval and knowledge, that after the acquisition in January of 2007, Meda had the benefit of a 17.10 euro reimbursement price for Tambocor CR for 22 months, almost two years had the benefit of that price. If Mr. Renaudin, and more specifically SEPS, had believed that there was an automatic price reduction, and that that Article 2.2 continued in existence and allowed SEPS to automatically reduce the price by whatever level, it could have implemented and effectuated that. It did not.

In fact, the actual history and chronology of the convention shows that SEPS, in the very first agreement that it had with Meda, didn't have this Article 2.2. That's consistent

with our reading, and I believe the appropriate reading of the September 15, 2006 amendment that struck Article 2.2, and it's consistent with the idea that SEPS had gone beyond Article 2.2 and realized that that indeed did cease to exist in 2006. And, your Honor, that was part of the negotiating strategy that Mr. Renaudin had with SEPS.

THE COURT: Does Mr. Schur testify about those statements from Mr. Renaudin?

MR. RENARD: I believe he does, your Honor, in his report.

THE COURT: In his declaration?

MR. RENARD: Yes.

In fact, at this point, your Honor, it might be wise to -- why don't we go to number 44, please?

This goes to the very point, your Honor, and again, this is one of those key issues that, if Article 2.2 is not in effect at the time of the acquisition agreement, then their entire Article 2.2 case falls. And yet it's interesting how little is devoted on the part of Meda to this particular issue.

Mr. Schur testified, and I asked him, going back to the March 2003 convention, because, again, that's the language in the way that Meda has described Article 2.2 as the March 2003 convention, did it even exist? And he said, obviously, on November 8, 2006, it was of no further force and effect. And that was because initially the November 17, 2003 convention

took it out of effect, but it then went again out of effect pursuant to the September '06 amendment.

This goes to the idea, your Honor, of controverting Mr. Destal's notion of symmetrical conventions.

I asked Mr. Schur, if we wanted to determine at any point in time what is the convention controls, you look at the chronology of the conventions and choose the one that was applicable at that point in time. Subsequent conventions abrogate prior conventions, and that's a natural consequence of 162.17(4) which is the operative statute.

Here, your Honor, is a chart of the various conventions relating to Tambocor CR.

The March 10, 2003, which is really the operative convention that Meda wants to focus the Court on, had an Article 2.2, but within a few months thereafter, and this was after Mr. Biffaud's conversation with Mr. Renaudin, had the November 17, '03 convention that Article 2.2 didn't appear in.

There were two subsequent conventions where 2.2 was put into effect, and then you have the September 15 convention in which it was eliminated.

And as I mentioned, your Honor, the very next convention, and there it is, September 28, 2007, this is the first one Meda France executed with SEPS after it acquired rights to Tambocor CR. There is no Article 2.2 whatsoever, and neither was there in the subsequent amendment dated September

17, 2008.

Mr. Schur took us through the chronology and mentioned that in his opinion, his expert opinion, as an expert on French law, that Article 2 was stricken in 2006.

Your Honor, here are some excerpts out of that provision.

Mr. Husson, who was then the director general of 3M Sante, struck out Article 2 and, as you mentioned, the rest of the provisions within Annex 4 to that proposed convention, initialed them, and sent it to Mr. Renaudin.

Your Honor, that was executed on September 15, 2006 and Meda has two arguments why this was inoperative. Number one, it was not counter initialed by Mr. Renaudin.

And, by the way, it's undisputed that Mr. Renaudin signed this agreement after Mr. Husson signed it and struck out Article 2.2. That's in Mr. Husson's deposition, which I think, your Honor, was part of our fact brief that we put in yesterday.

So you have Mr. Husson in a cover letter, to Mr. Renaudin, dated September 8, 2006, one week earlier, advising Mr. Renaudin that this provision was being stricken, strikes it, initials it, sends it to Mr. Renaudin, who signs it one week later on September 15, 2006.

Argument by Meda: This was not counter-initialed, the handwritten changes were not counter initialed by Mr. Renaudin.

The only expert testimony in the record, your Honor, that cites you to actual French law is Mr. Schur, who says you only need a counter-initialed handwritten change in a document that is notarized. He even cites the statute in France, saying, except with respect to notarized instruments, you don't need to counter-initial changes, provided that the person who signs last is the person who was not making the handwritten changes, and that was obviously the case here. 3M made it, explained it in a cover letter, gave it to Mr. Renaudin who signed it.

Argument number two by Meda is, well, this was only a week after this stricken-out convention was returned to Mr. Renaudin and nothing could happen in a week officially within SEPS.

Your Honor, it's interesting, the very first SEPS convention that Meda did with SEPS after Tambocor CR was acquired, that's the September 2007 deal, they made handwritten changes, and we are going to show it here in a minute, initialed them, sent it to Mr. Renaudin on September 27, 2007, and it was executed by Mr. Renaudin the very next day, September 28, 2008. And they are saying a week was not enough time and it makes it suspicious whether or not this was an official document?

Your Honor, those are the best two arguments they have. It was not counter-initialed by Mr. Renaudin, which is

only required in a notarized instrument, and, number two, that the short time between Mr. Husson's letter to Mr. Renaudin and the time that Mr. Renaudin signed it, and you can see the stamp signature there, September 15, 2006, makes it suspicious. And, your Honor, that's from someone who sent a handwritten change to SEPS which was signed the very next day after. There is no legitimate, genuine argument that this was not a valid striking and elimination of Article 2.2 from this convention.

They don't otherwise question the validity of the convention. In fact, they refer to it time and time again in their pleadings, in their filings, and during this proceeding that there was this September 15, 2006 convention. They refuse to accept the fact that Article 2.2 was stricken, because if you do acknowledge that it was stricken, and it was pursuant to French law, then all their arguments with respect to 307, 312, 315 go out the window, because this was not an obligation that was subsisting and enforceable and in existence as of November 8, 2006, the acquisition agreement, or at the time of closing two months thereafter.

This, your Honor, is one of those illuminating parts of this case, that and the fact that they never even cared to even ask or inquire about conventions. This is a major weakness in their case, and they just don't have much other than those two arguments in response.

Here, your Honor, Mr. Husson, just going back and

making sure we have covered this, Mr. Husson, whose signature appears on that September 15 amendment, says that he signed it, sent it on, and Mr. Renaudin's signature was applied thereafter. Therefore, there is no question but that Mr. Renaudin signed the instrument, having a cover letter addressed to him saying this was being stricken out, having it actually being stricken out, and he signs, and under French statute his signature constitutes his authority on the part of the economic committee to sign these. This was the convention that was in effect at the time that this deal on which they sue was executed. It was an amendment to the November 17, 2003 convention. And, your Honor, at that point in time, and moving forward, Article 2.2 just didn't exist.

Mr. Schur takes on each of their points here in his trial declaration.

Under French law, 2.2 is eliminated because French law does not apply to formalities, and that has to do with the initialing of handwritten changes because this was not a notarized instrument.

Number two, there is no requirement in SEPS' internal procedures that deletions be initialed by the president of SEPS.

Number 3, the SEPS president. Both that they believed Article 2 had become invalid and that 3M had struck it out.

And four, Mr. Renaudin thereafter signed the

convention on behalf of SEPS.

Your Honor, this goes back to what was going on at this point, what preceded that September amendment in which Article 2.2 was stricken out and the price of 17.10 euros continued in effect? This is the application that I mentioned earlier for renewal of the registration. And this is what 3M Sante told SEPS in January of 2006 prior to the so-called April 12 deadline. They are asking for renewal of their listing of reimbursable drugs, making a case, and this is a multipage document JX 49A, and at the very end saying, in light of all of the above, maintenance of the price of Flecaine LP at 17.10 is proposed.

This was the first volley in what was expected to be a negotiation with SEPS. What emanated out of that first volley in January of 2006 was a September 2006 amendment that struck Article 2.2 and maintained 17.10 euros as the reimbursable price for Tambocor CR.

THE COURT: We are either going to break now or in a minute. I don't want to interrupt your immediate flow.

MR. RENARD: What your wishes are, your Honor.

THE COURT: Why don't you tell me about this slide?

MR. RENARD: This is Annex 3, which, as I said, is breaking it down between regulatory act and matters either by administrative agreement or otherwise. Annex 3 is what counts for purposes of pricing. This was not stricken out. This was

what was proposed by SEPS in response to our January renewal application. This is what SEPS proposed and what 3M accepted, and that was maintenance of the price at 17.10.

This belies the notion, your Honor, that SEPS was dead set on reducing the price of Tambocor CR pursuant to the now nonexistent Article 2.2. They were fine with maintaining that price and that shows you and I think reflects somewhat on the meaning and effect and intent of Article 2.2. But this is where the price stood, 17.10, with no Article 2.2, and that was the state of affairs when these two parties executed and entered into that acquisition agreement and closed on the transaction.

Thank you, your Honor.

THE COURT: Thank you, Mr. Renard. We will pause on your timing. I think my staff conveyed we are going to take a lunch break. I am going to do a sentencing at 2. You can keep your materials here. To be safe, we will resume at 3:00. 40 minutes remaining, Mr. Renard, and then 20 minutes for the plaintiff. See you at 3.

(Luncheon recess)

AFTERNOON SESSION

3:00 pm

(Trial resumes)

(In open court)

THE COURT: Please be seated. Mr. Renard, before you get started, just to go back to a point you nearly ended on which was the argument about the dates, the strike-out which is in --

MR. RENARD: September 15.

THE COURT: -- September 15th of '06. So there is a timing issue that I wanted to ask about which is both of you have to some extent on 3.07 of the acquisition agreement, the date in there is December 31st, 2004, seller has complied in all material respects, dot dot dot.

So if I conclude, if I were to conclude -- and I understand your arguments against this -- that Article 2.2 created a compliance issue, then the compliance issue would have begun in April 2006, and that's several months before the strike-out.

Again I understand your arguments that there is not a compliance issue, but I also understood your focus on the strike-out argument as being whatever it was, it didn't exist at the time, but there is certainly a period of time where it existed whatever it was, right?

MR. RENARD: Your Honor, that is correct.

We believe -- and I believe we have discussed this, that Article 2.2 necessitated -- beyond contemplated, it necessitated there being another negotiation to arrive at another convention in order to effectuate any price reduction that might be agreed to by the parties.

In order to make that happen, we couldn't self-effectuate it, we just couldn't. What is required to happen is that we would have to initiate that discussion. In January of 2006 we filed a renewal application asking for a 17.10 euro price. That was before April 12. That ultimately resulted, your Honor, in the September 15, 2006 convention that had the 17.10 euro price and struck, we believe, Article 2.2.

The language that you focus on has to do with, "in any material respect." One, we believe that we initiated that negotiation that would have been necessary to reduce the price, but beyond that, your Honor, in terms of in any material respect, during that period of time, and that is from the time we made that application at the beginning of January, there was no indication by CEPS that they believed we were in violation, material or otherwise, of Article 2.2.

It was a non-issue. We believe it was a non-issue, your Honor, because CEPS realized, like we did, that what was being contemplated was that we would have to come back to the table. You just have to understand the language of 2.2, that second half clause, in order to arrive at a price reduction,

there there had to be a convention. Because it wasn't an automatic 50 percent or 5 percent or 10 percent, there had to be a negotiation over price.

Your Honor, we initiated that, and what 2.2 contemplated was a subsequent convention, and that, indeed, came about in September of 2006. I do not believe that, understanding 2.2 that way, how CEPS was handling it and how we were applying for new pricing, I don't see how you can say that was a derogation in any material respect from Article 2.2.

That, your Honor, and I think you're harkening to that provision that has historical reference to it, it is the only warranty on which Meda sues. It has historical reference. Since September 2004 there hasn't been a violation of a regulatory act in any material respect since that point in time.

THE COURT: Well, complied in all respects with all applicable regulatory requirements and all industry guidance.

MR. RENARD: Yes, your Honor.

With respect to the industry guidance because I gave that some thought, your Honor, and what is industry guidance? Well, first of all, it would be guidance from the drug pharmaceutical industry, things like best practices. There was an organization in effect called LEEMS, L E E M S, which is the French pharmaceutical association.

THE COURT: Do we have any testimony or evidence

regarding this?

MR. RENARD: You see the framework agreement, the so-called framework agreement that is mentioned at the beginning of a lot of these conventions. That is -- and mentioned in the ministry guidelines -- that is an overarching agreement that the drug association of France enters into with CEPS which kind of sets the foundation for these company-specific conventions. They are a pharmaceutical association.

You have to look at what does industry guidance mean, your Honor? That is a term, if they're going to say that that has any play here, I don't believe there was because there wasn't a violation of anything, be it a contract, a regulatory act or industry guidance. You have to give some construction to what that means.

I think a practical construction is best practices or other codes of conduct or standards that are set forth, promulgated by the drug industry in France, and I don't believe there is a violation of that. That has never been seized on. I don't believe this Article 2.2 -- again, whether you call it a regulatory act, a contract, something that was being contemplated, whether it is industry guidance, was violated in any way, shape or form. I think that is the meat you have to put around the bones of that particular term, industry guidance.

THE COURT: I know, I understand your arguments against it. If I disagree with that, I really want to understand the import of the timing issue and the strike-out, and so I think if I disagree with that, then even if the strike-out on September 15th, 2006 effectively annulled or eliminated 2.2, is there still a period of noncompliance, if that is what I think it is, that would fall within the 3.07 provision?

MR. RENARD: Then the inquiry would be whether or not there was noncompliance in any material respect with the regulatory act. For the monies, I don't believe there were.

THE COURT: I understand.

MR. RENARD: Meaning prior to August and September 15, 2006, during that run-up period from 2000 of until the time we entered into that convention, given what I believe 2.2 contemplated, what we did in order to initiate an organization and get a new convention, keep in mind when we initiated a convention, CEPS response wasn't okay, let's begin give-and-take of the bargaining, we want 11 euros. It wasn't.

Their response was 17.10 euros, and I don't think, your Honor, given that scenario, the fact that prior to April we initiated a negotiation and attempted a negotiation, certainly one that was meant to lead to a convention and did, in fact, lead to a convention, your Honor, you can say that was a violation or noncompliance in any material respect with

regulator to act or industry guidance or contract or anything else for that reason.

CEPS certainly didn't act as if it was. Nothing was said. We were never put on any notice, no suggestion was ever made by Mr. Renaudin that at the beginning of 2006 or any time in that period up to and including September 15, that no, 3M, you didn't do something you were suppose to do, and that bothered me and concerns us, et cetera, et cetera, et cetera, that never occurred, never occurred.

Your Honor, to kind of summarize that point where we are, and as Mr. Schur was talking about, no, 2.2 set a marker, and by that I don't mean minimizing what the language was, but it essentially said come 2006, we need to sit down, we need to have a negotiation and we need to enter into a new convention, and that is exactly what happened here.

If I may, that picks up with where we left off, and that is that, in fact, not only was there a strike-out of Article 2.2 which we believe was valid and I believe that we have overcome all the arguments that the plaintiff has made with respect to suggesting that that wasn't valid in any way, shape or form. The fact of the matter is, and this just underscores what I previously said, 17.10 euros was the amount that came out of that September 15th, 2006 amendment.

In other words, it stayed the same notwithstanding whatever 2.2 meant and regardless of whether 2.2 had been in

effect up to that point in time and that is significant. Why? This, your Honor, carries us forward in the chronology but also underscores a point that Meda has made in challenging the strike-out of Article 2.2. These are excerpts from the convention dated September 28, 2007. This is the first convention again that Meda entered into with CEPS during the period in which they had acquired the Tambocor CR rights.

You talk about handwritten changes, your Honor, and there are many, many if you scroll through JX 115, but you can see here, you've got a drug Zamudol that Meda has made handwritten changes to, decreases in the price.

THE COURT: Where am I looking?

MR. RENARD: JX 115. This would be Annex III to the September 28, 2007 convention between Meda France and CEPS. This goes to the point obviously that you can't make handwritten changes without being initialed by President Renaudin. You can't make it in any way. Here we have price changes being written in and you can see the first example, Zamudol LP, 50 milligrams, price decreases being written in and changes being made to the effective date.

Notice the effective date written in there, October 15, 2007. That is in the future. So Meda is writing down this price change is going to take effect sometime after this particular convention and they're handwriting this in, and they handwrite information regarding Flecaine LP. Notice the

prices, 17.10, and this was signed by President Renaudin.

Let's underscore this because one of the big points is you had to go through this long involved process in order to make a change to a convention; and, therefore, the one-week period between the time that we submitted that September 15, '06 amendment and the time it was executed by President Renaudin, it just couldn't have happened tat the CEPS committee signed off on that or otherwise approved it. There is no real evidence of that. They cite procedures from a 2010 CEPS manual, but that aside, these handwritten changes, your Honor, were signed by Mr. Renaudin on September 28th.

They were submitted to CEPS with a cover letter, dated September 27. One day after Meda France submits this with all these handwritten changes, it is signed by Mr. Renaudin, and they certainly don't question the efficacy of these handwritten changes are made with respect to CEPS convention. They did it not once, but they did it again.

Here we have some deposition testimony from Christian Senac. Again this was their 30 (b)(6) witness. He was also the country manager for Meda France who for some reason or another didn't submit a witness statement. That said, he entered into a convention in September 2007. Those Article 2 clauses were not included in that convention that he signed with Mr. Renaudin. Mr. Renaudin made no mention of a contractual decrease of 50 percent at that point in time.

I mention it was not just once they made handwritten changes, but it was twice. Here is the second Tambocor CR convention that Meda enters into and this is September 17, 2008. Your Honor, this is the point at which the first price decrease for Tambocor CR comes into effect, and it is a 13 percent price decrease initially and to take effect beginning November 1, 2008. Those are handwritten changes again were made by Meda and it was signed by Mr. Renaudin. Clearly handwritten changes on a non-notarized document such as a CEPS agreement that are countersigned by Mr. Renaudin are effective.

They themselves engaged in the very practice of which we stand accused of having somehow, some way not validly eliminated Article 2.2. I don't think any other arguments in that respect hold water. That was eliminated. It was signed and that very price carried forward. There was no Article 2.2 in that September 28th, 2007 convention, none.

Your Honor, we spoke earlier, and the court asked a question about what Article 2.2 really reflected and Mr. Schur's observations about how really what was going on was that CEPS was implementing those ministerial guidelines of September 2002 as reiterated in the various CEPS annual reports. We saw this in the opening statement, but it bears, your Honor, some repeating because it is important. These are three columns, Tambocor IR, the immediately release version is on the left. The Tambocor IR generic is listed in the middle,

and we have Tambocor CR also known as Flecaine LP in the far right. That CTJ column is the daily dosage cost. That is what CEPS really compares for the purposes of determining relative cost and pricing of one drug to another. As you can see, Tambocor CR and Tambocor IR begin at roughly the same daily dosage cost back in April of '03, right into low 87 area.

What happened in February of 2006 was that there was a mandatory 15 percent reduction in the price of Tambocor IR. This was a unilateral price reduction that was declared by CEPS, your Honor, at a time that CEPS had the power to declare TFR pricing, but decided not to, but instead to make an across-the-board 15 percent reduction with respect to all name brand products that had generic competition, and that includes IR. So we're out of whack, so to speak, in comparing CR's daily dosage cost with IR.

Then around January of 2008, in fact, it was announced the prior year, in 2007, TFR pricing went into effect with respect to Tambocor IR. You see the 45 cents daily dosage. It came down from 70 to 45 cents, and that was the same amount as the generic equivalent at 45 cents. So as we have been saying all along, a couple of things we are going on.

Number one, there was a risk in 2006, even prior to that, that IR was going to be subject to TFR pricing, meaning that the price, reimbursable price of IR was going to come down to that equal to IR's generic equivalent, and that in fact

happened and it was declared in 2007.

There is another policy that goes on and I didn't bore the court with the slides even though I had it earlier, about the often-repeated policy of CEPS that when you have a counter generic drug such as Tambocor CR that is introduced in order to match and meet the competition posed by generics to the drug that is meant to be replaced by CR, and that is Tambocor IR, and that is exactly what happened here. You recall that we introduced evidence, and I referred to it also in the opening statement, that 3M itself said that Tambocor CR was meant to, and I quote, "counter generics," of Tambocor IR.

The policy, therefore, was as Flecaine LI, that is the immediate release version of Tambocor, was coming down to meet the price of its generic competitor. CEPS policies were that the CR, the counter generic drug, would also start coming down at a rate similar to the drug that it was intended to replace. That is the immediate release version. That is Tambocor IR.

Look what has happened to today, your Honor? We're virtually, we're 12 cents off in the daily dosage cost of Tambocor CR with that of the generic equivalent to IR and IR itself. Now, why do we talk about this? You heard counsel say that it was Meda's expectation at least in the short to mid-range that there was not going to be any price decrease in Tambocor CR. Mr. Dierks' testimony was -- and he even said he repeated it in his deposition -- that were it not for Article

2.2, Tambocor today would still remain at 17.10 euros.

Your Honor, that just doesn't hold water. If you look at the policies, the minister's guidelines, the policies with respect to generics and their equivalents and also if you look at the policies with respect to the pricing of counter generics vis-a-vis the drug it was intended to replace, it all ends up at the same place.

Mr. Schur testified about this. He said ultimately CEPS policy, whether it gets there in a short period of time or it is a gradual period of time, is that that counter generic is ultimately going to be priced at a level equal to the generic competitor of the drug that the counter generic was intended to replace, here Tambocor CR coming down to the price of Tambocor IR which equals the price of its generic equivalent. Those were the policies of CEPS.

We'll present the court with a copy of our closing statement at the conclusion, as I am sure the plaintiffs will also. We have several slides to talk about these that set forth these policies. I didn't think we needed to go through that again. That is what is really going on here. That is what was really going on over the course of these discussions and conventions, and you can see the progression of the prices. That is precisely what went on.

THE COURT: Sorry. Just to go back to that one, part of the story that they tell is that -- and it is obviously

different than yours. I am trying to get the best way to get at this question. That makes sense only if that, the story you tell us will only make sense and would be knowable if you understood something initially about the price that it was initially set. I am not going to have a question.

It has to do with Mr. Felber's testimony you pronounced with a French accent earlier, but the idea that the only reason that price was as high as it was as an initial matter was because that was a price negotiated in the context of 2.2 and the imposition of this policy that you're talking about, but it -- so I guess I am struggling to see how the story that you're telling incorporates or doesn't that beginning point of the story that they tell.

MR. RENARD: Your Honor, that is interesting.

I did see the references to the original high price of Tambocor CR. What is interesting is the first time that CR came out on the market, obviously it was pursuant to that March 2003 convention, and you'll see here the effective date of CR coming out was April 12 of 2003.

THE COURT: Right.

MR. RENARD: If you see, your Honor, the daily dosage cost, and Mr. Schur talks about this in his reports, in his declaration, is virtually equal to that of the daily dosage cost of the IR version, meaning measured by daily dosage cost, and that is how CEPS compares drugs for the purposes of

reimbursement pricing, you really didn't have CR coming out at a higher level from a CTJ standpoint than was the IR version.

You know what? That is perfectly consistent with the minister's guidelines at the time that say with respect to a Category IV, that is, an ASMR IV counter generic drug, it should be registered at a price so that relative to the drug that it is replacing, so that there is no additional cost to the health care system in the short or middle range, and your Honor, I would say that application of those minister's guidelines in this particular situation, they were applied imperfectly because if, in fact, CR had come out at a higher CTJ price, then that would have been contrary to minister's guidelines that had been instituted only four months prior to that time.

THE COURT: What do you make of Felber's testimony?

MR. RENARD: I am not sure what to make of it, your Honor, because it is in consistent with what actually happened, is in consistent with the minister's guidelines.

I also say this: You had a 17.10 euro price that continued in effect through November of 2008 which you can see here. I am not sure if, in fact, that CEPS was making some kind of a devil's bargain that you're going to start out high, but you're going to end up low, your Honor. What you see here is consistent with CEPS policies.

In fact, and I point this out earlier, as I mention in

February of 2006, you had a 15 percent decrease in the daily dosage reimbursement cost of the IR version. One would think, therefore, that application of CEPS policy also, you were going to see a 15 percent corresponding decrease in the price of Tambocor CR, I don't just say that. Mr. Mariotte says that. He says it well could and should have been expected there would be a 15 percent decrease in CR around this time.

Well, in fact, that went into the calculus that 3M was making with respect to its budgeting for 2007 and it also went into the calculus that Meda was making for 2007 and 2008.

To the court's point might the 13 percent reduction that became effective in November of 2008 followed by the additional 20 percent reduction in October of 2009 somehow, some way represent a deal that was struck originally by CEPS back in March of 2003, and I'd say, your Honor, what you're seeing here -- maybe that kind of shows you that the spirit and intent of Article 2.2 was exactly the way Mr. Schur described it and that was this was a way of applying and effectuating CEPS policies.

That is true, and I think history has shown this out. The only thing we can say is that there is still some room there for future decreases in CR to get down to the level of IR and its generic equivalent, but that undoubtedly will come because those are CEPS policies, and I think that is perfectly consistent with Mr. Schur's testimony.

Your Honor, if I can now talk some about these warranties in the time I have remaining. 3.12, your Honor, you spoke with counsel about this. One thing I would add to the court's analysis, let us not collectively forget that what this contract was and what the subsequent contracts were such as the French acquisition agreement, this was a sale of assets. This wasn't a stock sale. This was a sale of assets. At some point contractually you have to identify what the assets are that you are buying. That is why you have these schedules. That is why you have a definition of assumed contracts being the documents listed on the schedule. It is the same that the regulator findings, your Honor, those are scheduled and listed matters. You don't buy what you don't list on the schedules to these acquisition agreements.

This notion of well, it couldn't have meant what it actually says, assume contract has to be more than definitional thing whatever is set forth in the schedules. That is just not correct. This was an asset sale necessary for the parties to identify the assets. There were contracts going to be conveyed pursuant to this deal, were contracts listed initially on the acquisition agreement, subsequently on the individual country acquisition agreements like the French agreement. That is why that makes sense and it is not a circular thing, as counsel said.

THE COURT: I want to make sure I have it. So 3.12 is

not meant to be an exhaustive document disclosure provision, it is meant to be an asset disclosure provision.

MR. RENARD: "Assumed contracts" is defined as those things listed on the schedules. What I am saying is the reason you have lists of contracts and lists of personal property and lists of regulatory filings is that's what is getting transferred over to Meda.

I would parenthetically state that those CEPS conventions do not get listed anywhere on the list of assets that are being transferred pursuant to this acquisition agreement, but pursuant to the French acquisition agreement. That was no mistake, your Honor. Those don't get transferred.

What actually got transferred were the marketing authorizations, and we'll get there in a minute what that means. A marketing authorization, and this is really not denied between the parties, a marketing authorization in France is issued by the FDA equivalent in France. It is the permit, the license, the approval that is necessary that the agency has said I think this is safe and effective and I'm going to allow it to be marketed and sold. That agency is a health agency and that permit allows for the testing and marketing and sale of drugs.

CEPS is not engaged in that. CEPS doesn't permit the sale of drugs. It permits the reimbursement of drugs being sold on the market. Those are two different things, and to

call it a health authority is like calling the Federal Trade Commission a health authority because it somehow regulates what goes on with boxes the drug is contained in. It is not a health authority.

Your Honor, "assumed assets" was a defined term.

Counsel frankly identified the very issue that I had identified when we were having a dialogue with them, and that is it could have been and should have been worded differently if the parties had intended otherwise. It could have been that "assumed contract" means these important contracts with respect to A, B and C, period, all assumed contracts are listed on schedule, whatever it is. That is not the way they defined it. This is self-definitional, your Honor, under "assumed contracts."

To take the first one as an example I believe was underlined by plaintiff, contracts pursuant to which a third party purchases products from seller that are set forth on Section 1.01 A, that is definitional.

Then you get to the question that was raised in opening statements by the plaintiff, and that is well, what did this mean? It was all circular. No, it is not circular because you have the warranty that none of those assumed contracts were in material breach. That was an important warranty and that was the warranty that was given.

Your Honor, we just don't fit within that. We are not

an assumed contract by definition. It would take reformation of this agreement which is not being asked for by the plaintiff to get there, and I believe, your Honor, that dispenses with 3.12.

We get to 3.15. All existing material regulatory filings held by any seller are set forth on the disclosure schedule and then further representations regarding no written notice of any proceedings, of any actual possible renewal of regulatory filings or terms less advantageous to the seller.

For reasons we have already talked about, and that is that 2.2 wasn't even in effect, we believe at the time of the acquisition agreement, then 3.15 doesn't even kick in. I would go further than that, your Honor, and that has to do with the whole definition of regulatory filings.

By the way, what I have on these screens is verbatim out of the plaintiff's complaint. Why I have done that, it does accentuate to the court the language they're suing on rather than taking the provision as a whole.

Cutting to the chase here of what we believe is before you, "regulatory filings" means marketing authorizations in addition to correspondent. "Marketing authorizations" means the registrations permits and other licenses issued by a health authority that permits the clinical development, manufacture, use or sale of the product.

And any supplements or variations thereto? What does

that mean? Supplements and variations to those authorizations, registrations, permits and other licenses including all pricing and reimbursement approvals?

Then you have definition of health authority again which is the agency responsible for bringing licenses and approvals, permitting testing, manufacture and sale.

THE COURT: So the health authority argument you make is that CEPS couldn't be a health authority because it deals with price?

MR. RENARD: Price.

THE COURT: Pricing and reimbursement?

MR. RENARD: Yes, your Honor.

THE COURT: Well, why, then, what then could the comment including all pricing and reimbursement mean?

MR. RENARD: I mentioned this in opening argument because I believe the court had some question. I emphasized at that point -- and I can elaborate even further now -- we have to keep in mind --

THE COURT: It seems like I still have the same question.

MR. RENARD: Yes, your Honor. We need to keep in mind this acquisition agreement was meant to apply to pharmaceutical assets and businesses in 81 countries, a pretty impressive list under the defined term "territories," 81 countries.

I mentioned at the time and have subsequently done

research on this, that you can have a health authority that issues reimbursement pricing approvals. It is not the situation in France at all because you have two different agencies, but you do have countries within this territory. Your Honor, I haven't begun to do an exhaustive list, but I have looked at the world health authority available information, and I can give you one notable example, and that is Italy, where the Italian Medicines Association --

THE COURT: That is not now in evidence.

MR. CARLINSKY: I have been reluctant to object. None of this is in evidence.

MR. RENARD: That is the point, your Honor.

It doesn't mean that you can't have a health authority that has pricing and reimbursement approval authority. France doesn't. The mere attachment of that clause including all pricing and reimbursement approval doesn't do away with the necessity it needs to be a marketing authorization that permits the development, manufacturing, use or sale.

THE COURT: Why can't, why can't the clause be read marketing authorizations means the marketing authorizations, registrations, permits and other licenses, and then everything after that seems like it, until and any supplements thereto or until including all pricing and reimbursement, refer to licenses.

So "marketing authorization" means marketing

authorizations, and any other licenses for product issued by a health authority that permits the clinical development, manufacture and sale within the territory; in other words, why can't the health authority reference one reading of it which at least occurs to me is that that health authority only references the licenses.

MR. RENARD: Your Honor, it would be an unusual use of the word "including" if what you're meaning is to use references to a conjunctive, means marketing authorizations, registrations and all pricing and reimbursement approvals.

THE COURT: But this is a provision that begins with marketing authorizations means marketing authorizations. So we get off on a bad foot, don't we?

MR. RENARD: Your Honor, perhaps the easiest way out of that puzzle is a marketing authorization still has to be issued by a health authority, and a health authority is not CEPS. It is not necessary to gain CEPS convention, a convention from CEPS in order to put on the market in France a pharmaceutical.

THE COURT: The drafting history of this provision which is in evidence, right, it had been just licenses, and then I think what gets added are these other things in front of licenses and then the including all pricing and reimbursement.

MR. RENARD: If I am not mistaken, the language added is the including all pricing and reimbursement approvals. They

said they added it, don't really explain precisely the circumstances why or what was intended to be encompassed by that, but I believe that you still have --

THE COURT: Well, just go ahead. I didn't mean to interrupt.

MR. RENARD: Please!

THE COURT: Maybe to cut to the chase and let you move on, let's assume I find ambiguity in this contractual provision, they say in their papers submitted the other day and I think you said, too, they put in testimony as to what the intent of adding that including all pricing and reimbursement approvals means, but you haven't done anything to counter that, is that right? Or is there anything in evidence?

MR. RENARD: What happens, your Honor, when we get into these various trails, we have to remind ourselves what we are. This has to do with 3.15. That is a warranty. There hasn't been any violation essentially of a regulation or regulatory filing, and that we have provided them with all regulatory filings. If I may start the analysis there, with respect to whether or not we have provided them those things, even if a CEPS convention qualified as a marketing authorization or a regulatory filing, you still have that argument at 15.02 B which says the confidentiality provision and the law, you don't have the obligation to make that available.

THE COURT: You are bobbing and weaving, Mr. Renard.

MR. RENARD: No. Beyond that you have the fact there was no violation of a regulatory filing at the time for all the reasons we have talked about.

THE COURT: Okay, I understand.

MR. RENARD: And with that, your Honor, 3.15, we believe, doesn't come into effect. I think that also segues into 3.07 that I think if may, your Honor, in the time I have available --

THE COURT: Yes, you have 8 minutes, but I will, because I settled a case yesterday, I am going to give both sides a little more time.

MR. RENARD: Your Honor, 3.07, and again this is an excerpt out of the plaintiff's complaint, to seller's knowledge, seller is a defined term. It includes three particular persons of relevance here; Mr. Traineau, Mr. Vant Hullenaar and Mr. Sampson.

The business is not in violation of any law including any environmental law. Even, your Honor, if we read the law broadly to include convention, and without making any distinction between the regulatory act part of the convention as opposed to any administrative agreement or aspirational statements in any Annex IV, we weren't in violation of any such law.

That then brings us to the second sentence the court

inquired about. I think we had a fairly expansive dialogue about that. Seller has complied in all material respects with all applicable regulatory requirements and all industry guidance. Your Honor, I believe the way that 2.2 is worded, its intent, the way CEPS treated it and the way it acted with respect to its application as well as the ultimate convention that emanated out of that in September 2006, that even if you want to inquire in the pre-September 2006 time-frame whether there was any noncompliance in any material respect, we would say no for the reasons that are mentioned.

Your Honor, that brings us to -- I would like to spend a couple of minutes with respect to the fraud claim and then any additional time the court wants to provide me with respect to damages.

I think the one thing I would say about the fraud claim, it begins with a false premise. You have heard -- in fact, you heard Mr. Carlinsky talk today about what a dog 3M's pharmaceutical business was, how we were desperate to unload this. Your Honor, I harken back to a slide that we saw in the opening, and I think we saw it again here today. John Sampson to Brad Sauer, March 21, 2006, not a pretty picture, a death spiral.

THE COURT: Right.

MR. RENARD: Your Honor, as has been explained, that referred to the so-called harvest scenario, one that is

undisputed. In fact, we call it, it is called a dog and it is called a terrible business that we were just itching to unload.

Your Honor, this business was profitable, meaning you take the portfolio of pharmaceuticals and all the assets and the businesses, it was generating far more revenue and sales than it was spending in expenses. It was profitable.

It is difficult to say you have a business here that they say they would have spent at least $600 million. I say they would have spent $854 million had they been possessed of the knowledge they claim they weren't possessed of which they were in possession of, regardless to say that a profitable business was a dog and trying to get rid of it. It was profitable.

3M, however, was confronted with a crossroads. It either could, because this portfolio of drugs, a lot of them were older drugs, that should be news to Meda, meaning they were running out of patent, newer replacement drugs were coming in, it was still making money and would continue to do so into the future. Those projections that were listed there were entirely accurate, but, your Honor, they were confronted with a crossroads, and it was do we invest more money into research and the development of additional drugs so we can replenish our portfolio with newer drugs, keep the pipeline going or do we allow these drugs to die off?

I don't say that harshly. They had their useful

economic life run out. Obviously, your Honor, when you are talking about a harvest scenario, which means let's harvest what we have and drugs we have without replenishing the pipeline, death spiral, you can call it what you want, but it meant ultimately the business was going to -- the drugs were going to cease having a useful economic life at some point in the future. That is no grand mystery to Meda. Yet it is such an essential part of the loud and proud story of fraud that they put forward that it was a dying business and we just had to get rid of it.

I could go on with a lot of different examples of the overstatements of their fraud claim, the misuse of Helene Kolsky internal documents that we saw time and time again during this case, but I think, your Honor, that the whole chronology of CEPS conventions, what happened, the dialogue that we have had and the presentation I have made thus far and the court has seen with respect to the contract part of the case and what they were really interested in, and it wasn't specific product information, the fraud case, your Honor, doesn't hold water especially when you talk about the clear and convincing standard.

We have very good lawyers here representing Meda, and they've put forward what they believe is the best evidence of what they need to make a clear and convincing standard. It is material like your Honor overstating what was actually going on

with the pharmaceutical business. We have another one, your Honor, it is JX 24. Pull that up, please.

This is the statement, if we can go back, Drew, to the prior page, right there at the bottom. You saw this highlighted, Flecaine, you have already obtained much effort trying. Everything is specified in the convention. Keep going to the top of the next page, the statement about and executed with ferocity.

It is interesting. What we didn't see is the last bullet point, and this is a reference to what Mr. Renaudin was telling 3M back in the middle part of 2004. However, the joint registration of LI and LP in 2006 could open the door to a renegotiation of the convention. We will talk about it again in 2006 when the product line is recalled.

Your Honor, that is consistent with the understanding that all the 3M employees that you heard testify from the stand believed, that what we had was a negotiation that was going to take place in 2006, revisiting the price of Tambocor CR, and that would be done in connection with re-registration of the entire Flecaine product line at that time, and that is what happened.

Your Honor, to read into this that everyone within 3M was dead solid certain that there was going to be a reduction due to Article 2.2 and that reduction was going to be in the magnitude of 50 percent, you can slice and dice whatever

internal documents from Helen Kolsky you want to, but it just doesn't accurately reflect the feeling that, and the understanding that those in charge of 3M Sante believed at the time, especially once we got into the latter part of 2005 and first part of 2006 when we did make that application, we did receive the convention back.

2.2 was stricken and the 17.10 euro price stayed in place. Your Honor, there has been talk about a deliberate delay in order to push off this problem onto the sellers, onto the buyer's lap. Your Honor, the fact of the matter is that -- and the testimony shows this -- that when we made our re-registration application in 2006, in connection with that there had to be a revisitation of the ASMR rating, the rating of the relative employment over then existing drugs, that is redone as ASMR rating. That didn't come out until November of 2006.

In order to re-register, in order to get CEPS to engage even further in price reduction, in order to come up with a brand new convention, and that's what needed to happen either at the tail end of 2006 or the first part of 2007 because recall that November 2003 convention was for a three-year period, and it was set to expire. In order to get a brand new convention, a start-over annual convention, if you will, it was necessary to have the new ASMR rating because you can't decide a particular drug's reimbursement price until you

have an ASMR rating, and that didn't come out until November. The idea, therefore, this was a deliberate slowdown and delay, your Honor, just doesn't hold water given what had to happen in order to enter into a new multi-annual convention.

Your Honor, a lot could be said about these various internal documents, and obviously a lot of this was read back to our various witnesses. The fact of the matter is by clear and convincing evidence was there an attempt to hide from these folks a specific convention relating to a specific product? And the answer is absolutely not.

Judge, whatever time --

THE COURT: Let me see where we are.

(Off-the-record discussion)

THE COURT: You are five minutes overtime. You are going to do damages?

MR. RENARD: Your Honor, I think the court has our full understanding of our multiple criticisms with respect to not only their damages model, but their causation case, your Honor, and if the court prefers, I can --

THE COURT: I tell you what. Why don't I give you 10 minutes more if you want it. You pick the topic. Then I'll give them equal time or if you want to rest on the papers.

MR. RENARD: Your Honor, I will be very brief about damages.

Mr. Neuberger was sponsored as the damage expert in

this case, and as became evident from his testimony and frankly his reports, it was no great secret that Mr. Neuberger was depending upon the opinions of Mr. Gallagher and Mr. Mariotte with respect to putting together a damages model.

Mr. Marriott's opinion may well have been the most important in the damage model, although there are many, many defects with Mr. Gallagher. Mr. Mariotte, who is not a French lawyer, but testified as someone experienced with CEPS, gave his probability opinions with respect to the chances of CEPS enforcing Article 2.2. Of course, we believe it didn't exist and the proof shows it didn't exist at the time of the acquisition agreement.

Along with that probability, the probability of -- or the extent to which 2.2 would result in a price decrease, I asked Mr. Mariotte if there was any objective formulation with respect to this approach that he used, and he said no. He spoke as an experienced person.

I tried to emphasize, but it didn't show up very well on the screens, the I's and E's, and suffice it to say Mr. Marriott's opinions about the likelihood of 50 percent reduction and 5 percent reduction come from his anecdotal experience with CEPS. There was no proof whatsoever he ever encountered with CEPS or otherwise a clause even remotely similar to 2.2, that he could from virtue of even his own personal experience apply that in coming up with some

probability of the timing, extent and magnitude of any price reduction.

But it is on Mariotte's foundation that Dr. Neuberger builds his damages cause. Your Honor, one of the things Mr. Neuberger said, it is important to isolate the effect of the breach from anything else that was going on at the time that had price reduction consequences, and this ties back to that -- I don't want to call it a perfect storm, but a combination of policies that CEPS had at the time that were over time going to drive CR down to the level of IR which was being given down to the level of IR's generic competitor. That was a given.

Yet Mr. Mariotte does nothing to isolate those probabilities from what he said is the separate and independent effect of having Article 2.2 there even assuming it was still in existence, and it wasn't.

I asked Mr. Neuberger, Dr. Neuberger -- because I believe it was a relevant inquiry -- his whole point was if Meda had been possessed of the information known to 3M, how would Meda have assessed the probabilities and magnitude of a future price reduction. I asked him well, given your attempt to create this hypothetical, was there a drug company out there who knew of Article 2.2, whether or not it existed and whatever it meant and also was in the business of projecting what future product price decreases would be? Answer: Yes.

Obviously, 3M, and then we looked through 3M had to

conduct a business and had to be serious about it and had to, for the purposes of reporting up to corporate and the European division, come up with its best estimates of what the price decreases were going to be for these products in the future.

In 2006 Ms. Barreau testified, and this was long before Meda ever came along and long before any efforts to try to sell the pharmaceutical business, that they projected a 13 percent decrease in the year, fiscal and calendar year 2006 for Tambocor CR.

Of course, there wasn't a price decrease, but that's what they had in mind. Possessed of whatever Meda believes was relevant, 2.2, whether it was in effect, counter generic pricing, the possibility of TFR pricing, that's what they came up with in a serious attempt to budget for 2006. Answering Mr. Neuberger's question what would a reasonable pharmaceutical company have assessed of the risk of price decrease, not isolating 2.2, but taking it all in together, it was no more than 13 percent. 2007, it was a 10 percent price decrease.

Your Honor just jumping ahead here, and that is exactly the way Meda assessed the risk in 2007 at a time we believe the evidence shows that they were very well aware of Article 2.2, whatever it meant and whether or not it was in effect.

In fact, your Honor, for 2008 they budgeted a 15 percent price decrease at a time when they certainly had

knowledge of Article 2.2, taking into account with their own admissions they learned about 2.2 either in the February or fall or December of 2007. They knew that rolling into 2008 and they only budgeted a 15 percent price decrease.

I say all of this because this is reality, real businesses having to make projections what was going to happen in the future so they could run their business. This isn't Mr. Mariotte combined with Mr. Gallagher on top of Neuberger coming up with a hypothetical there would have been a 95 percent of a 50 percent reduction and, therefore, we are entitled to $210 million in damages. Your Honor, that just doesn't wash.

One thing that I'd like to leave with, your Honor, is the fact -- talk about the French agreement, the agreement every time it is mentioned, the plaintiff's sale, we can't talk about it. Your Honor, they don't have a case unless there was a closing and an actual transfer of assets including the French assets that was the subject of their case.

To say we should see, speak, hear nothing about the French agreement is to ignore that key part of the chronology of what happened. The French agreement was part of the closing binder. Whether the court finds it supersedes the acquisition agreement with respect to the warranties or was part of all one contract, it still doesn't change this fact, and this fact is that the person, the company that bought the French assets, including the marketing authorizations, the licenses issued by

the French equivalent of the FDA, was Meda France.

Meda paid the purchase price acting on buyer's behalf, but the obligor, the ultimate obligor was Meda France. You recall from Mr. Stenqvist's testimony during the cross-examination by Ms. Bevilacqua that what happened here -- and it is precisely what we knew had happened -- is that Meda fronted a loan to Meda France to purchase these assets and took a valuable receivable in return.

This isn't a shell game. It is not hide the ball. It is the fact that the company that is saying it was damaged made a loan. The terms of that loan we don't know. Was it interest-bearing? Was it non-interest-bearing? It doesn't matter. They made a loan to a company so it could buy assets, Meda France, assets being the French pharmaceuticals, it now owns and it is those assets that plaintiff is saying have been so horribly devalued.

Your Honor, Meda France -- sorry -- Meda made a loan as a valuable receivable. If they wanted to come in here with a damage model and saying we are only getting 3 percent on that intercompany loan and we could put that money to work and make 6 percent, then that is a fine and dandy damage theory, but that is not what they have. This isn't a gotcha. This isn't something that comes from their only annual reports and something they never realized and looked at.

The fact of the matter is, $132 million was the total

amount that was paid for the French business and acquisitions they say was so devalued. Compare that to the $210 million they say represents a 50 percent decrease in the price of Tambocor CR, which is only one of many assets that was conveyed, there is a total disconnect between the amount that was actually paid for these assets and the damage theory.

But of equal importance, your Honor, is the fact that that money, those assets and the ultimate obligation was by someone who was not a part to this matter. What they have is a loan, and their damage theory is not based upon that. Your Honor, the damage model itself, independent of the argument I have just made, doesn't hold water. It is based upon Mr. Mariotte's subjective personal experience. He is not a lawyer. He is merely talking about probabilities, your Honor, that don't even compare to the probabilities and the projections being done by people who were in the business of doing it, namely, 3M until the time it sold those assets and then Meda after it acquired those assets.

His 50 percent reduction scenario doesn't even come close to the 10 to 15 percent per year reductions that 3M was projecting in '06 and '07 and Meda was projecting in '07 and '08. That reality check, your Honor, I think speaks volumes about their damage theory.

I want to end on this, your Honor, on behalf of 3M and our litigation team. This is our last opportunity to speak to

the court. I want to thank the court and its staff for its service, consideration and the good humor throughout this proceeding, your Honor, and I am sure I speak on behalf of both parties. As I said, we'll provide the court a copy of our Power Point.

THE COURT: Thank you, Mr. Renard.

(Recess)

THE COURT: Please be seated. You have I think 38 minutes, Mr. Carlinsky, and we are going to stick to that time.

You have a fair amount of territory to cover.

MR. CARLINSKY: I do. I will try to cover some, but not all, but for the first time I am going before Mr. Armenio so I don't feel as though I am as pressed for the clock. Let me get right into it if I may.

First I want to start with the question that your Honor asked with regard Sections 3.12 and 3.15. The argument that was advanced by 3M was that well, if you looked at those provisions, those provisions on their face effectively require the disclosure or production of all documents, and you knew you didn't get all documents; and, therefore, somehow that was a tip-off that either the provision hadn't been complied with, and they put up the slide that had the Allegheny case, and the argument was you should have known at that point that effectively you have been defrauded. I think that was the slide they put up.

What I want to emphasize -- and this is a very small point but an important one -- when you look at 3.15 and 3.12, the word "all" is qualified in the relevant provisions by the word "material." If I go to the Elmo, for example, we see in 3.15 it talks about all existing material regulatory filings held by the seller are set forth on the disclosure schedule.

Again the idea is not to bury the purchaser in paper, but to disclose that which is material, and it makes sense, and consistent with what our witnesses said, I don't need a convention that merely says price equals X. What I want is something that is material.

Your Honor knows the definition of materiality. It has been on the books ever since the Basics of Levenson. What would a reasonable purchaser want to know? That is what this is ultimately doing, qualified the definition by materiality.

So does 3.12? 3.12 has not surprisingly a materiality limitation. It is down here at the bottom, seller has made available to purchaser true and complete copies of not all assumed contracts, but again material assumed contracts, the idea being if it is material and you're assuming it, we want to make sure we made it available to you.

Now I would like to address the question your Honor asked, which is okay, if I read this language literally, don't you have a problem, Meda, and do you have case law which stands for the proposition that in reading a provision, you should

avoid a construction that would render it either absurd or its provisions superfluous.

While I didn't have a chance to go back to the office during the lunch break, we did a little bit of research, your Honor. I am sure we'll address this in more detail in our briefs, but the law is well settled in New York and I suspect everywhere, this is a case that we pulled called GPA, Incorporated versus Liggett Group, a Southern District decision.

I have Second Circuit authority as well, but as the court can see, and as I say we'll brief this forward, it is a cardinal rule of contract interpretation that a court should not interpret an agreement in a way which leaves the part meaningless or in effect will bore will the court.

If you look down at the N.Y.2d Department case --

THE COURT: Can you look at the document the other way?

MR. CARLINSKY: Yes. What this is telling us, even in the first analysis when the court is deciding is it clear and unambiguous, the rules of contract interpretation are very straightforward and well-settled. The first thing the court does is you don't read a sentence in isolation. You always read it in context of the provision in which it is found and the agreement. That is Cardinal Rule No. 1. We'll brief that.

Then these two cardinal rules of construction

ultimately come in. When you read 3.12 in context, then we understand that it is perhaps the single most important rep that a seller could give to a buyer to protect it against what are the material contracts that I'm now undertaking and obligating myself. When you read it in that context and when you read it in the context of, as Mr. Armenio said, your Honor, if 3.12 merely means, it merely means the materiality contracts are those I've chosen to put on the schedule, the rest of 3.12 is unnecessary, it would be surplusage, and we'll cite cases which talks specifically about avoiding an interpretation that would render any provision superfluous.

It would certainly lead to an absurd result because it would literally say 3M, you get to choose what you want to put on the schedule and I have no recourse as Meda, as the buyer. It would lead to an absurd result. It would eviscerate, your Honor, with respect to the whole purpose of that particular provision.

That is why it makes no sense to read it that way. By contrast, if you read the provision the way Meda proposes, which is it is not designed to simply say you get to put whatever is on the list and that is it, but instead you're making a representation to me that all material assumed contracts that I'm now going to be bound by have been disclosed to me, every one of those provisions, every one of those provisions is harmonized and that is what the rules of contract

interpretation tell us, harmonize, not find ways to read it that leads to absurd results.

I think that goes to the question also of in the first analysis when your Honor looks at it, it is ambiguous. It is, when read in context, ambiguous especially when we apply those rules of construction.

The second point I want to raise relates to this 502 argument as we predicted before we got to trial we would hear new arguments when we got to trial. In fact, this is Slide 42 -- why don't you bring up Slide 42. This is one of the new arguments we heard for the first time at trial. 7, 8, 9, if we updated the list, we are probably to 10 or 11. Why do I mention this? First of all, it was never raised. This notion of 502 B, somehow confidentiality created some kind of a barrier was never raised.

Why wasn't it raised?

Again we have had this discussion back in December. Here is the amended answer that 3M filed. That is a pleading the court can look at, 18 affirmative defenses. Now we hear, my God, we couldn't have. Where was that so we could have addressed it during the course of the litigation properly?

They submitted a letter. This was Ms. Shapiro's letter, PX 413, in evidence, August 13, 2012. Your Honor is new to the case. Let me tell you what the case is about, Judge, goes through an entire discussion about the case. You

know what is not in here? Wait a minute, we couldn't produce this. There was confidentiality prohibitions in 502 B. Not a word.

What we know is this argument is a recent invention, invented sometime between August 13 when this letter went in and opening arguments, opening statements. We didn't hear this argument when we were here for the final pretrial conference. It is a new invention.

What does it tell us? It should be given the same attention by the court given by 3M throughout the course of this litigation, which is zero. It is a new-founded argument and it is nonsense.

Now, not only wasn't it raised, you can look at all of the witness declarations that 3M put in. They don't say a word about this. Their own witnesses would be expected to say the reason we didn't give you this convention, Meda, was because we couldn't. 502 B, they had an opportunity. I guess by the time the declarations were being drafted, it hadn't occurred to them yet. The scales hadn't fallen from their eyes quite yet.

Then, of course, we have Mr. Keel who testified. In his testimony, and your Honor will remember he mentions -- because there was this issue raised where Meda -- Keel, at 1065, and I asked him certainly by November 6th you believed Meda was a serious bidder, correct?

At this time we still, absolutely.

Then I said and so I guess what you're saying is that to the extent that there were contracts that you previously were hesitant to disclose because of sensitivity or confidentiality concerns, by the point post-August 30 receipt of that firm bid, you were comfortable disclosing them to Meda?

"Right."

Of course, that was the case. Again I don't want to belabor the point of Mr. Brown's memos. We looked at before, but all he said is to the extent there is any sensitivity regarding any of these documents, whatever they are, maybe we leave them out in the first round, meaning we don't know perhaps when the first couple of companies demonstrates some level of interest, that they're really serious. All he talked about was the first round.

He talked about nevertheless, but let's make sure from a disclosure standpoint what do we do? We put a document in there. We put a slip sheet in there. We put something in there that tells the buyer there is something here you might be interested in, but we might not be able to give it to you just yet.

Mr. Brown talks about in later stages making sure that the documents are ultimately produced. This confidentiality argument I really don't think I need to say more about it other than it is a new-founded excuse. It is one of the additional excuses.

Then we hear, and we heard this in opening, my God, your Honor, Meda has conveniently failed to mention the November 2003 convention. We heard it in opening. We heard it in closing. How could Meda have done such a terrible act, never mentions the November 2003 convention. Well, wait a minute, 3M never mentions the November 2003 convention. That is yet another one to add to their list that was raised for the first time in opening arguments.

How do we know it? Again is it in the answer as an affirmative defense or as anything? You don't find a word about it it in Ms. Shapiro's letter where she says wait, the November 2003 convention somehow trumps or the March convention was -- forget what the word was, abrogated by the November 2003 convention. Not a word. Is it mentioned in their summary judgment papers? Not a word. Yet here we hear for the first time this is it, and we're somehow at fault for not having raised it when in two years of litigation they didn't raise it.

I think again it tells us what we are seeing from 3M is a company that doesn't want to accept responsibility for its misdeeds, and it is going to throw every technical argument it can against the wall in the hopes that something is ultimately going to stick.

Now, we also heard how CEPS was not a health authority. I don't think we need to revisit that. All I want to point out is Mr. Sampson certainly thought CEPS was a health

authority. This is in his declaration at Paragraph 19. That even after pricing has been agreed to between the government health authorities and the pharmaceutical company, the debate and negotiations can be ongoing. I asked Mr. Sampson with were those his words? Yes. Did he carefully review his declaration? Yes.

Then I asked him, at pages 825 and 826, do you see that, pointing to that reference? The reference there to government health authorities is a reference in that paragraph to CEPS? Answer: Well, it's to the overall health authority of which CEPS is a part.

Now, why is that also important? Because Sampson's involved in the drafting of the acquisition agreement. To the extent that he understands health authority to include CEPS, doesn't that shed light on what health authority as used in that agreement means?

Here is the guy telling us CEPS is a health authority and he is involved in the drafting of that particular agreement, and there are other references in the record to CEPS being a health authority, and the definition itself ultimately bears it out.

Then we heard -- because your Honor asked the question of under 3.07, let me just get myself together here a minute -- well, wasn't 3M in default before, and we'll talk about the cancellation, alleged cancellation, but wasn't there a default

before because we know what happened in April? Nothing. We know what was supposed to happen in April. A lot.

The answer we heard from Mr. Renaudin was wait a minute, we had initiated negotiations with CEPS. Well, that is not the case. We know that is not the case because we haven't heard any testimony to the contrary, but again let's look at, for example, this is JX 63 from the infamous Helen Kolsky to her cast or band of brothers on the steering committee, and this is April 20th. And she tells us that the first meeting with CEPS is to occur in July, the first meeting.

What Mr. Renaudin tells us is wait a minute, in January we started our negotiation,. Not so. It was supposed to start in July.

THE COURT: Didn't he say they sent a letter?

MR. CARLINSKY: He said they sent a letter. The letter was sent to the transparency committee. Remember what they were looking for. They were trying to get a reaffirmation of the ASMR rating at IV, and that sets the whole process of delay, delay in motion.

But not to CEPS. According to what Ms. Kolsky is saying, we are not going to meet with CEPS. Week 29 is July by my calculation of week 28 above or week 26 is the end of June. It is supposed to start in July and it is supposed to go late into the year, but the negotiations haven't even begun with CEPS as of April, which to your Honor's question, they're in

breach. Of course, they're in breach. This notion they started the discussion is just completely undermined.

Ms. Kolsky says it again, PX 194 A. This is in May, May 30th, this is where she boasts again about how this delay is going to make the image of the pharma business up for sale look a lot prettier, but she says down at the bottom, we plan to use that point, referring to Merck, as one of our negotiation levers in July. Then she says in October when the discussion with Renaudin actually begins, we'll be in the final phase of the court proceeding.

So as of May 30th, there is no discussion, nothing. They sent a letter. They sent whatever their application is into the AMSR rating, but nothing with respect to cells.

I am going to just briefly touch upon this notion of the cancellation. I am going to defer that one to Mr. Armenio. I think we know ultimately by 3M's position the fraud here then was perpetrated by CEPS and Mr. Renaudin because there was no Article 2.2 according to 3M. When Mr. Renaudin came knocking and said Article 2.2, 50 percent, he must have been perpetrating a fraud. Of course, that is a absurd. When we look at what ultimately happens, it tells the answer. There was no agreement by CEPS to any cancellation.

I want to go back to something Mr. Traineau said. When Traineau was testifying, what he said was that in July, Article 2.2 lapsed. I asked him do you mean this agreement

that people negotiated for 400 days, that the steering committee has been focused on now for three years, that has been the object of your obsession for three years, it literally lapsed? He said yes, it lapsed in July.

Then I asked him so when you got to September and you strike that out, that's just a ministerial act? That had no meaning? He said that's correct, from our standpoint it had lapsed in July.

That was his testimony loud and clear. It is absurd, but that was his testimony.

"Q And your position is that by July, because there had been no discussions with CEPS, that somehow Article 2.2 had lapsed?

"A Yes."

I was somewhat incredulous. I then said down at line 20:

"Q It was just gone because Mr. Renaudin as of July hadn't had you into his offices yet for a meeting? Your view is that at the end of it, is that what I am understanding you to say, it lapsed?

"A It lapsed, yes.

He, of course, was unaware of any decision, meeting, any consideration by the CEPS board that would have been in effect allowed 3M to unilaterally say well, this agreement is over. I will let Mr. Armenio -- I don't want to steal his thunder on that point.

Then I asked him, I thought you said that was the striking, meaning the striking of the document they sent back, was not a decision because you had already concluded that the provision had lapsed as of July. Do I have it right? And he said yes.

Frankly, up above he talks about how the striking was just essentially a ministerial act. From their standpoint as of July because Renaudin hadn't had them into the office yet, this thing lapsed. Your Honor knows from having seen the documents the reason Renaudin didn't have them in was because they filed this application and deliberately pushed everything so the business would look as pretty as it possibly could to the Swedes, and they pushed off those discussions that would have ultimately taken place.

Now let me finish on fraud. Your Honor, frankly, I find it incredible, incredible that we did not hear a word about why Mr. Sampson did not disclose that which he knew. He came in and was redirected. He never addressed the question. I certainly expected there is going to be a plausible, benign answer. I listened. I am certain there was no explanation given. There was no explanation given why at the French level Kolsky in her e-mail that said I'm not going to produce it and Brown saying let's make sure we have documents in there that indicate to a purchaser, or Traineau, who knows all about the existence of the convention, and he has testified about how he

knew they had to try to overcome it, an explanation to the court. Mr. Wanlass couldn't give us the explanation, we know that, but I expected after all of these years we would hear the explanation.

Why wasn't it produced in France, number one? Was that question ever answered? They never addressed it.

Even more so, Mr. Sampson, who admitted to knowing of the convention, who admitted to knowing of its terms, who admitted to be sitting there in meeting after meeting with Meda, who according to Meda, was discussing pricing issues with them and never disclosed it, not a word to explain why. And the answer is because there is no explanation, there is no justification. That conduct is deplorable. That conduct amounts to fraud.

Your Honor has more than clear and convincing evidence particularly in light of Sampson's knowledge and the failure of Sampson or 3M for that matter to even address the issue.

Now we didn't hear anything about the disclaimers and so I am not going to go back to that particular point other than to again preview something we'll address in our brief, which is in addition to the peculiar knowledge doctrine, there is a doctrine of law -- slide 136, please, James -- this is also a doctrine of law called the special facts doctrine, a duty to disclose. It is not even a reliance issue. A duty to disclose arises where one party's superior knowledge of

essential facts renders a transaction without disclosure inherently unfair. Again we'll provide the court with further authority on this particular point. It is clear they knew, we didn't. They put out a 264 page management presentation.

They put out a 110 page management presentation that is also in evidence, your Honor, that is specific just to Europe. It is 150 pages.

MR. CARLINSKY: DX 582 is specific to Europe. They put out a 108-page offering memorandum, and no one has answered the question that I submit to your Honor which is why not one sentence, one sentence that will tell anyone look at all the great things I'm telling you about this drug Tambocor CR, how it is going up and it is going up and it is going up and it is going to offset the declining market. One sentence in all of these documents, it can't be found. When Sampson had an opportunity to make it right, to look Meda in the eye, when he knew they were a serious buyer, sitting there negotiating the acquisition agreement, he remained silent, and we have no explanation as to why.

I want to end by saying, your Honor, where is the line? Where is the line where business ethics cross the line into fraud? This case crosses that line. 3M doesn't seem to understand where that line is. This Court, your Honor, has the power to define that line and to tell 3M and any other company like it that enters into a transaction like this you've crossed

the line when you have this information and you don't disclose it.

Your Honor, I respectfully submit the fraud case here is absolutely clear. 3M has crossed the line, and I ask your Honor respectfully to make sure in the future everyone knows where that line exists. Thank you very much, your Honor.

Thank you very much to the court staff as well.

THE COURT: Thank you, Mr. Carlinsky.

MR. ARMENIO: Your Honor, I wanted to briefly address three points.

First off, we have heard a lot about Mr. Schur and CTJ. The first point, Mr. Schur, there is no evidence in the record that the gentleman has ever appeared before CEPS even one time. He said right in his own declaration, Paragraph 2, lawyers don't do that in France. So they're proffering a person with no experience. We heard a lot from Mr. Renaudin about these people at 3M and all their experience. Not so.

Ms. Barreau was touting she had negotiated one and not even personally negotiated, but been involved in one CEPS convention ever.

Mr. Biffaud didn't negotiate this. He referred to Mr. Felber as the expert. When we hear about their theories about CTJ and conventions, what strikes me is that it is nowhere in the documents. Where is it in the documents that 3M has documents from the Flecaine steering committee where they

are worrying about CTJ and general CEPS? We look in the documents for Article 2.2, it is in document after document after document.

May we see Slide 48, please.

When I asked Mr. Biffaud when he was here, I said look, let's talk about these general policies and you and your team thought you could do that, you could maintain the Flecaine LP price in France through the expiration of the patent in November 2009 despite any general CEPS policies and the like, correct? Answer: Yeah, we believe we could maintain the price.

It is in the trial record, 907, Page 907, Mr. Dierks believed the same thing, they could maintain the price. That is in the trial record at page 189. What is not in the trial record is any of Mr. Schur's hypotheses about CTJ and the like. It just isn't there because that is not how anyone in the real world looks at this.

We have heard counsel say it many, many times, he keeps calling Flecaine LP a counter generic. That is incorrect. Everyone agrees it has an ASMR rating of IV. Under all the CEPS policies, that is not a counter generic and CEPS has pricing freedom to have negotiation.

What happened here is that freedom was taken away through 3M's own agreement by articles 2.2. That is what really is going on. Your Honor asked the question well, what

about when the patent expires, isn't something going to happen in the price? The relevant testimony there, only from Meda witnesses in Dr. Dierks' declaration, Paragraph 29 and 30, and Mr. Lonner's declaration, Paragraph 55 and 57, and they explain that unlike in the U.S. where there is automatic substitution at the pharmacy, so there is a huge patent cliff when things go generic, in France you get to decide whether you want to go to the generic.

These are patients who are on a heart erythmia medication they take every day and switching medicines, they might have one of the arrhythmias they're worried about, having stroke and perhaps even die. So as Dr. Dierks explained, who is a medical doctor, people are very reluctant to ever switch. No pharmacist wants to take that risk of switching a patient. No doctor wants to take that risk and certainly no patient just to save a few euros is going to put their own life in jeopardy. That is why no one at Meda was concerned about there being a big fall-off in the price once the patent disappeared.

Meda saw a stable asset that was very unlikely to suffer from strong generic competition because of the kind of drug it was.

What was the problem is they didn't know of Article 2.2, 3M had already agreed to make it generic. As your Honor said, at a bare minimum CEPS had already told 3M that it was going to treat Flecaine LP as a result of Article 2.2 as a

generic by 2006.

I think Mr. Destal would go a little further than that, but at a minimum that is what happened and 3M never told Meda about that agreement, about the possibility as what Mr. Schur calls at least that there were markers that this is where CEPS was going. If Dr. Dierks and Meda had known that, it would have completely changed the whole dynamic of the negotiation and the team.

Let me talk the second point, cancellation. This argument is so fundamentally misguided that I am trying to just stay and work through it as logically as I can. There were 400 days of negotiation. We see in JX 142 A, a chronology that is 25 pages long of all the interactions with CEPS to get this initial price. Then when Article 2.2 is brought up with Meda, we see countless letters back and forth negotiating, haggling over the price, Meda says we didn't know, please don't take the whole 50. CEPS saying we want the whole 50.

What do we see with this handwritten striking?

Nothing. There is no discussion like that. There is no contemporaneous documents going back and forth, and Mr. Traineau, he admitted on the stand there was no meeting of CEPS. He wasn't even aware of anything being scheduled. So there was no chance for the minister of social security, who had blocked the initial price for over a year, that minister never got any notice of anything. There was never a meeting of

the committee with all the ministers that they could even discuss this much less vote on it.

What counsel did is he, in a little slight of hand, superimposed the signature on the front page with some of the strike-outs, but as your Honor has seen from the document itself, JX 95, there is no indication that Mr. Renaudin looked at this at all. There is no counter-initial. There is no discussion back and forth with him on proposals and counter-proposals.

It makes no sense that after negotiating so hard on this issue and extracting this concession from 3M in exchange for granting them a high price --

THE COURT: The high price point, Mr. Renard focused my attention on the chart that showed the daily dosage price, and that paints it in a different light, I think.

MR. ARMENIO: It paints it in a light, a light he likes to talk about. Can we go to JX 25 A R, please. Can we go forward one slide, please.

This is the real world document from -- can we blow that up, James -- from price differences and catch the little stuff there. Thank you. This is the internal 3M document that actually talks about what prices were being sought by LI on the left and LP on the right. 3M wanted 18 euros. CEPS wanted 13.2, and 3M was able to keep it to 17.1, and in exchange for -- and this is indicating both sides liking LP slow acting

generic and three years.

I understand Mr. Renard wants to talk about CTJ and Mr. Schur does, but nobody else in the whole case was talking about that. It is not in the contemporaneous documents.

What is --

THE COURT: I am not sure that answers my question which is part of the story telling Mr. Felber's testimony goes to this is about how this was a hard fought negotiation and what 3M got in exchange for 2.2 was a high price which they were essentially buying for three years. We'll take a high price for three years and take a dive on the price at the end of three years. Just help me understand your response to it actually wasn't that high price if you think about daily dosage.

MR. ARMENIO: What the high price was, and it is reflected in the best document I can refer the court to, JX 142, the chronology, other documents reflect it as well, initially social security wanted a generic of LP immediately. It wasn't oh, match the price of LI. It was we want the generic of Flecaine LP right now, the first thing to go on the market should be generic-priced, generic version Flecaine LP.

3M had to negotiate with CEPS off of that by saying two things: One, oh, we need to build the market up for three years to make a generic even viable; and, two, we need the money for three years to fund our IRM portfolio. So when we

look at the high price, we have to look at it in comparison to what social security initially wanted which was a generic of Flecaine LP immediately.

This is certainly if all of these prices that end up were far, far higher than it had been launched in the first instance as a generic. The only way they placated the minister of social security as part of CEPS was through these prices which are, in fact, high because they weren't talking, even the ministers weren't talking about CTJ or Mr. Schur or Mr. Renaudin's theory. They were saying we want a generic now, now in 2003, and they granted a high price for three years because of those two reasons I mentioned. And again this is reflected best in their chronology, JX 142.

THE COURT: I hope you will use some remaining time on hopefully both, but the ancillary agreement and damages.

MR. ARMENIO: When we look at the ancillary agreement issue, the merger clause, among other things, and the merger clause in the contract eviscerates their argument in the acquisition agreement. The acquisition agreement merger clause talks about how this agreement including the ancillary agreements shall be read as a single operative unit.

So the ancillary agreements didn't supersede anything. Moreover, if we look at it from a damages perspective, they're ignoring $400 million in the U.S. The actual trademarks, trade dress, patents and all the other rights, the know how all of

that was allocated on this tax allocation to the U.S. They're missing $400 million.

So saying, ooh, it says 132 million here, then they're ignoring $400 million for a country everyone on the stand admitted it was the biggest country in the business and Tambocor was the biggest product. The $132 million argument has been way long gone. If your Honor looks at it for damages, it is incomplete because it doesn't address the 400 million that was allocated to the U.S. where Meda didn't buy any assess.

It is not how Meda valued the business. How Meda valued the business, the uncontroverted evidence it was an EBITDA multiple approach. Go to slide 139.

We know Merrill Lynch gives us the standard for damages at the time of breach, at the time of closing, what the purchaser would have paid had they known. Dr. Neuberger gave the right, correct formula for calculating this and nobody criticizes Dr. Neuberger's formula. They like to criticize the inputs, but there has not been any criticism of Dr. Neuberger's formula. One of the things important, and Dr. Neuberger explained it both in his declaration, 72-75 and on the stand, this methodology can be applied to any percentage inputs.

Here I have to pause for a second and talk about Mr. Mariotte. Mr. Mariotte has been impugned, to say the least, by Mr. Renard and the 3M team. We brought to the court a

gentleman who had as his job when he was at Schering Plough negotiating with CEPS, and then started a consulting company where he consults for lots of pharmaceutical companies and public unions and all the relevant stakeholders in France, he has had over a hundred negotiations with CEPS, and they're trying to say well, it is too subjective, he doesn't know enough.

But Mr. Schur has never appeared before CEPS. Ms. Barreau who on the stand didn't like it when I said she wasn't an expert in CEPS conventions and she thought she was, had one negotiation. So what we have for Mr. Mariotte is we have got -- go to 147, James -- we have got a person who has the best possible experience here.

Again as Mr. Mariotte explained, there isn't a book or a database where we can go to to look up this information about what happened when people tried similar renegotiations with CEPS, but we do have Mr. Mariotte who has got his 100 interventions.

In his experience were somehow atypical, he wrote an expert report in this case. He has been disclosed long, long ago. They would have brought someone. If Mr. Mariotte's experience was atypical, abnormal, incorrect, I am positive counsel or counsel's predecessors, their predecessors before them would have brought your Honor contrary evidence from another individual.

THE COURT: Isn't this case contrary evidence?

MR. ARMENIO: Sorry?

THE COURT: Isn't this case contrary evidence?

MR. ARMENIO: I don't believe it is because if we look at it, Mr. Mariotte said --

THE COURT: This is in the 10 percent?

MR. ARMENIO: Yes, 10 percent chance that it could be a 30 or 40 percent, and in this case we saw Meda was able to get mercy, the lesser reduction by explaining to CEPS we didn't know.

And what Mr. Mariotte said is there is no chance that CEPS, having bargained for this price reduction, could ever give it up for no reason, could ever give it up without a corresponding benefit.

We see in reality, that is what happened with Meda. When Meda said we didn't know, CEPS didn't say okay, that is okay, we understand, zero. They still took 30 percent off the price. There was never any possibility proffered by CEPS or Meda or any evidence at 3M that zero percent was on the table when CEPS came talking to Meda about this.

We also know that 3M itself calculated this. It is in JX 25-A R. They calculated exactly the difference between what 3M was forecasting and what CEPS expected, and it was about $24 million euros. That is exactly the input we see in the EBITDA change that Mr. Gallagher uses as an input and Mr. Mariotte.

They want us to say oh, it should be different numbers, it should work differently.

Dr. Neuberger addressed that on the stand. Okay, what if you turn it around and say 5 percent chance of the full 50, 5 percent chance of 40 and 80 percent chance of 30 since we know 30 actually happened. His formula and methodology still works. You can still use it and the damages can work out to 117 million and then there would be interest.

When we look at it, 3M wants to talk about causation, DX 274. When Meda saw a problem with a drug even as small as 2.6 million, what did they do? This is Mr. Keel's notes, DX 274, they raised it with 3M and they said they wanted a purchase price adjustment and they pursued it doggedly.

There is no way they could have been told of a risk of a 50 percent price even if it was potentially possible it might only be 30 or 40, there was no way they were going to let this go without a purchase price adjustment. We know that from a fact Mr. Keel's own notes on drugs as mall as 2.6 million, Meda wanted and got a purchase price adjustment.

I want to echo counsel's thanks to the court. The Court, Mr. Silverman, Ms. Nunez, all of our court reporters, I apologize for all the French and Swedish we got a little bit of. Thank you, everyone, for your patience and consideration.

THE COURT: I thank counsel again for their hard work and zealous representation. The matter is submitted and I'll

put out an opinion in due course. I'll a wait your post -- did I set a schedule?

MR. RENARD: We did not, your Honor.

THE COURT: How about if I do it now?

MR. RENARD: It would be a three-step process.

THE COURT: So again the balance here is the sooner I get this, the better. I wish I had it now. As I say, I was supposed to start a trial on Monday and I settled that case last night. I have time on my hands next week. I don't know if anybody is in a position to get it to me next week.

MR. CARLINSKY: I don't think so, your Honor. I tried pushing the team. I have seen a lot of tired eyes, too, on the team the last couple of days. We were going to propose, with the court's permission, a week from Tuesday, so tomorrow is Friday, it would effectively be I think 10 days, we have two weekends.

Given we go first, we ask for Tuesday and try for that Monday. In fact, I am willing to to say that Monday to try to compress the schedule and the back end for reply, we only ask for five days. We want to do it as quickly as possible. I want to make sure we give the court what it needs, what it expects. There are legal issues have been raised. We want to make sure we address them and not just a rehash of everything the court has already heard.

THE COURT: I think that is fine. So let's say set

your brief and come back and talk about pages if I haven't done that already. So let's say a week from -- at that point say a week from Tuesday. Mr. Renard?

MR. RENARD: Your Honor, with respect to our response, I guess it would depend upon page length, but if we were in that 25 or so page --

THE COURT: Yes, in that ballpark.

MR. RENARD: A week later, with the court's indulgence?

THE COURT: It should take you longer to write a shorter brief.

MR. RENARD: Abe Lincoln said something about speeches.

THE COURT: All right. Let's set then the following Tuesday as the response and we'll get five days for reply.

MR. CARLINSKY: Yes, your Honor.

THE COURT: I am going to propose -- I want to give you the room that you need, but I want to constrain you horribly, and I can assure you that shorter at this point is going to be more impactful.

I think I am inclined to say 25 or 30, so I'll say 30. My inclination would be to do 30, 30, 10.

MR. CARLINSKY: That is fair, your Honor. Thank you.

THE COURT: Don't make the font smaller. Don't give me a gazillion footnotes.

MR. CARLINSKY: Single space?

THE COURT: Don't change the spacing between the lines. I am not going to give you a word count, but be reasonable. I do think the more you cut to the chase of your arguments, the better, the better off.

That is all I need. Again, we are grateful if you both ECF and e-mail, courtesy copies to get to it right away.

MR. CARLINSKY: Each side wanted to give the court a copy of the closing.

THE COURT: I think we are at Court Exhibit 4 will be plaintiff's closing, Court Exhibit 5 defendant's closing. I think that's all I have. Needless to say, I am merging the summary judgment motions into the final opinion, so those will be administratively dealt with. I think that is all I have.

MR. ARMENIO: Nothing further.

THE COURT: Mr. Renard?

MR. RENARD: Nothing from defendants. Thank you, your Honor. Thank you, your Honor.

THE COURT: We're adjourned.

(Court adjourned)